Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States

CHRISTOPHER J. PARRY,
Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC.; AUSTINTOWN AMBULATORY ER; MEDEXPRESS; DRUG FREE, INC.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

TIMOTHY J. GRENDELL
GRENDELL & SIMON CO., L.P.A.
6640 Harris Road
Second Floor
Broadview Heights, OH 44147
(440) 746-9600

Attorney for Petitioner

*NATALIE GRUBB
ATTORNEY AT LAW
437 West Lafayette Road
Suite 260-A
Medina, OH 44256
(330) 725-7252

Attorney for Petitoner
**Counsel of Record*

April, 2001

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

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QUESTIONS PRESENTED

Whether an implied private right of action exists under the Federal Motor Carrier Safety Regulations and the enabling statutes for Christopher J. Parry and/or other similarly situated drivers when the testing procedures and/or protocol fails to comport with strictly mandated drug and alcohol testing procedures designed to protect and ensure employee privacy.

Whether an abuse of process, and, thus, an unreasonable search and seizure occurred concerning the initial driver random drug test and whether the demand for a second non-random invasive drug test rose to the level of an unreasonable search and seizure under the Fourth Amendment.

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STATUTES:

Federal Omnibus Transportation Employee Testing Act
of 1991 (FOTETA) as codified under
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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. B) is unreported at *Christopher J. Parry v. Mohawk Motors of Michigan, et al.*, 2000 FED. App. 0420P (6th Cir. 12/29/00).

The Memorandum of Opinion of the District Court of the Northern District of Ohio, Eastern Division in *Christopher J. Parry v. Mohawk Motors of Michigan, et al.*, denying reconsideration is unreported and is set forth in the Appendix hereto (App. C).

The Memorandum of Opinion of the District Court of the Northern District of Ohio, Eastern Division in *Christopher J. Parry v. Mohawk Motors of Michigan, et al.*, granting summary judgment is unreported and is set forth in the Appendix hereto (App. E).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on December 29, 2000. The Court of Appeals entered an order denying a timely petition for panel rehearing on January 31, 2001.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution.

The Fourth Amendment states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On July 11, 1996, Petitioner Christopher J. Parry signed a contract with Defendant Arnold J. Pritchard and Pritchard's company, Defendant APIC, to drive on their behalf. Defendant Pritchard leased drivers and trucks to Defendant Mohawk. Mohawk acted as the carrier and dispatched leased drivers for particular runs. Defendant Pritchard signed an agreement with Mohawk stating that his drivers would participate in a drug testing program as mandated by federal law.

On August 6, 1997, Petitioner was selected for a

random drug test. Petitioner received instructions to proceed to a terminal in Lordstown, Ohio because that location was the most convenient. At the Lordstown terminal, Petitioner was given a Federal Drug testing Custody and Control Form ("CCF") and a testing kit. Parry was then instructed to drive to Defendant Austintown, a clinic and emergency room, for collection of his specimen.

Wendy Carter, a technician for Austintown, supervised Petitioner's urine collection. The CCF indicates that the collection process began at 12:15 p.m. on August 6, 1997. Initially, Carter indicated that the temperature of Petitioner's specimen was "in range." However, she testified during her deposition that Petitioner's specimen "felt hot." Pursuant to instructions from her supervisor, she took the temperature of Petitioner and his specimen. Carter's notes indicate that Petitioner's body temperature was 98.2 degrees Fahrenheit while Petitioner's urine specimen was 104.6 degrees Fahrenheit. Additionally, Carter determined that the specific gravity of the specimen was about 1.0, indicating that the specimen was too clear for normal urine.

Although the specimen temperature did not match Petitioner's body temperature, Carter sealed and boxed the specimen to ship to the laboratory for testing. She testified that her notes were written down after the specimen was boxed. By this time, Petitioner had been given a copy of the CCF. In addition, three copies of the CCF were sealed in the box with the specimen. Carter altered the copies of the CCF

to indicate that the specimen was not within the proper temperature range. Because various carbon pages had already been separated, the alteration did not appear on all copies. Carter stated that she initially indicated a normal temperature on the CCF because she had never encountered an abnormal specimen before and assumed that Petitioner's specimen would be normal as well.

After the collection, Parry was taken to an alcohol technician for an alcohol breath test. Carter testified that she told both the alcohol technician and Petitioner that he could not leave because another urine specimen was required in light of the temperature and specific gravity readings of Petitioner's earlier specimen. Petitioner testified that during the course of events, "[h]e knew [he] had to stay at the facility (App. B-6) after the alcohol test, Parry was escorted to the waiting area near the reception desk.

At approximately 12:50 p.m., Carter went into the reception area and observed Petitioner re-entering Austintown from the outer doors of the emergency room. She had a conversation with Parry in which she explained to Petitioner that he could not give a second specimen because he had left the facility. Although Carter's notes indicate two specimens were taken, and the second was observed by a doctor, the notes also indicate that Petitioner left before the second specimen could be taken. Carter explained the discrepancy by stating that the initial statement was written down based on Petitioner's agreement to give a second specimen. He left the

facility, however, before she or a doctor actually had an opportunity to take the second specimen.

Subsequently, Parry made a phone call to Defendant Pritchard for instructions and spoke to Pritchard's wife. After the call, pursuant to Petitioner's employer's instructions, Carter was directed to send his first specimen for testing. Petitioner's phone call and Pritchard's instruction are reflected in Carter's notes. Petitioner then left Austintown.

At approximately 2:05 p.m., Parry returned to Austintown again with the intention of giving a second specimen. Carter instructed him to wait while she determined whether he could give a second specimen. She contacted Linda Campbell of Central Transport. Campbell informed Carter that because he had left the facility, a second specimen could not be taken because under the regulations, leaving constituted a "refusal to test." Campbell then advised her supervisor, Randall Fields, that there was a problem with Petitioner's drug test. In a subsequent conference call between Carter and Fields and/or Campbell, Campbell reiterated that a second sample could not be taken. They instructed Carter to send the original specimen and explained to Petitioner that he should contact Defendant Pritchard for further instructions.

On August 7, 1997, Defendant MedExpress received and tested Parry's urine specimen for drugs. The specimen was also tested for specific gravity and creatinine level. The specimen tested negative for drugs, but it had a specific

gravity and creatinine level below that required by the regulations. Although this did not mean that a driver was disqualified, it did mean that a driver could be required to give an "observed" specimen in a subsequent test. The results were reported to Defendant Drug Free, the Medical Review Officer ("MRO"), for review.

Drug Free received the results on August 7 or 8, 1997. Dr. James Haber, an employee of Drug Free was the physician who acted as the MRO for Petitioner's case. He testified at his deposition that negative results ordinarily receive an administrative review. Negative results are also not discussed with the employer. Dr. Haber only recalled discussing the results with David Eades, the president of Drug Free.

Eades testified at deposition that the motor carrier is notified of a low specific gravity or creatinine level even if the tests are negative. The reporting is necessary to permit the employer to require an observed specimen in subsequent tests. Eades also testified that he had discussed negative results with employers when problems with the collection process were brought to his attention.

Fields and Campbell contacted Eades within days of Petitioner's test. They were concerned about whether it was proper to send a "hot" specimen out for testing. Eades explained that all specimens, regardless of temperature, must be tested under federal regulations. They also inquired as to the ramification of the low specific gravity and creatinine level. Eades further explained that this did not result in

disqualification, but the employer had the option of requiring an observed specimen in subsequent tests. Eades instructed his employees to look into the matter further; the employees in turn contacted Austintown and MedExpress for their version of events. Between August 13 and 18, 1997, the parties faxed information to each other surrounding the circumstances of Petitioner's drug test.

Carter testified that any subsequent inquiries about Petitioner' were referred to Fields. Other than these referrals, she did not have any substantive discussions with anyone about Petitioner. Fields and Campbell testified that they did not talk about Petitioner to others.

Parry no longer drives for Pritchard or Mohawk. Petitioner was terminated because he allegedly took Defendant Pritchard's tractor across state lines without permission. When other truck owners and operators made inquiries, Fields and Campbell responded by providing only general information about Petitioner, including his employment dates, whether there was a positive result in previous drug tests, and the last date of his test.

The district court granted Defendants' Motion for Summary Judgment and denied Petitioner's Motion to File a Second Amended Complaint, and the court of appeals affirmed the district court's judgment.

The court of appeals found that Petitioner's amendment would be futile as he has not stated a claim under

Bivens,[1] and then stated that Petitioner can not allege and prove a violation of his constitutional rights because he was randomly selected to take a single drug test pursuant to federal regulations. (App. B-14 to B-15) The court of appeals also concluded that the regulatory scheme does not evince a concern for the protection of drivers who believe that they have been aggrieved through the drug testing process and that FOTETA or the regulations promulgated thereunder do not imply a private cause of action. (App. B-19 to B-20)

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW FAILED TO PROPERLY APPLY THE TEST FOR AN IMPLIED PRIVATE RIGHT OF ACTION UNDER FOTETA, DOT REGULATIONS, AND, THEREFORE, DRIVERS AND OWNER/OPERATORS ARE WITHOUT REMEDY WHEN DOT TESTING PROCEDURES AND SAFEGUARDS ARE NOT UTILIZED.

The Sixth Circuit court in reviewing the underlying statute, the Federal Motor Carrier Safety Regulations (49 U.S.C. §31306 or "FOTETA") cited only to one portion of the statute and determined that the purpose of the statute was simply to establish drug testing programs "in the interest of commercial motor vehicle safety." (App. B-16 to B-17) However, the court failed to properly analyze the entire statute which evidenced the protection of individual employees' privacy as a purpose of the statute and regulations.

Employee-drivers like Petitioner are entitled to an implied private right of action as named entities under FOTETA. The Ninth Circuit's analysis in *First Pacific*[2] of the *Cort v. Ash* test (422 U.S. 66, 78 (1975)) (as modified by *Touche Ross & Co. v. Redington*, 422 U.S. 560, 575 (1979)) is applicable in this case.

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[2] *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000).

A. Under the four-part *Cort* test, this Court should look to the congressional intent element to find an implied right of action under 49 U.S.C. §31306.

1. Is Petitioner a member of the class for whose special benefit the statute was enacted?

The overarching goal of 49 U.S.C. §31306 is to protect the safety of the public and to ensure adequate protection and privacy of drivers; employees, and owner/operators through drug and alcohol testing regulations and rehabilitation programs. Individuals and employees are specifically named beneficiaries in the statute, as they are referred to in pertinent part in FOTETA:

> promote, to the maximum extent practicable, **individual** privacy in the collection of specimens. *49 U.S.C. § 31306(c)(1)*;
>
> the minimum list of controlled substances for which **individuals** may be tested *49 U.S.C. § 31306(c)(2)(B)*;
>
> provide that each specimen be subdivided, secured, and labeled in the presence of the tested **individual** and that a part of the specimen be retained in a secure manner to

> prevent the possibility of tampering, so that...if results are positive...the retained part [is] tested by a 2d confirmation test...*49 U.S.C. § 31306(c)(5);*
>
> provide for confidentiality of test results and medical information...of **employees**... *49 U.S.C. § 31306(c)(7);*
>
> ensure that **employees** are selected for tests by nondiscriminatory and impartial methods...*49 U.S.C. § 31306(c)(8);*
>
> Rehabilitation. The Secretary of Transportation shall prescribe regulations establishing requirements for **rehabilitation programs**...*49 U.S.C. § 31306(e).* (emphasis added)

Under *First Pacific*, this specific naming of a beneficiary or entity in the statute places that beneficiary as a member of the class for whom the statute was created.

Further, analogous to *First Pacific*, the test results must be made available to the employer, and pursuant to federal regulations the drivers have the same right to receive reports of the drug testing. Reports cannot be released to other unnamed parties. These regulations place the

employees/drivers on the same footing as the employers. Furthermore, the employees not only have a right to obtain reports (*49 C.F.R. Section 40.37*),[3] but cannot be forced to waive any negligence of the testing facilities. (*Section 40.25 (22)(ii)*) Last, the employees control access to the individuals who can see the results and reports.(*FOTETA §382.405(h)* and *U.S. DOT 5/4/97 Interpretation, Section 382.405, guidance at question 2*)

The Ninth Circuit analyzed this Court's decisions and found support for its position in this Court's analysis of the first *Cort* factor in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979). The *Cannon* Court reasoned that:

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefitted class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. 441 U.S. at 690-91.

In contrast, a 'generic imperative' was not found to

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[3] 49 C.F.R. Section 382, *et. seq.* and Section 40.1, *et seq.* are regulations promulgated under FOTETA.

benefit any particular class in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 61 L.Ed.2d 82, 99 S.Ct. 2479 (1979). There, the statute in question required that: "every national securities exchange...shall make...records...and make such reports, as the [Securities Exchange] Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors.15 U.S.C. § 78q(a) (1970)", quoted in *Touche Ross*, 442 U.S. at 568-69. While U.S.C. § 78q(a) imposes a requirement on brokers and dealers, there is no named beneficiary of the requirement. *Citing First Pacific Bancorp*, 224 F.3d at 1122-23.

The *First Pacific* court found that since shareholders were specifically named in the statute to receive reports, then shareholders are members of the class for whose benefit the statute was enacted. *Id.*

Here, 49 U.S.C. 31306 directed the Department of Transportation (*"DOT"*) to protect the individuals' privacy, and, further, to provide rehabilitation to individual employees. Further, the *Nat'l Treasury Employees Union v. Von Raab* Court stated: "The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the service and to prevent the promotion of drug users to those positions." 489 U.S. 656, 666, 109 S.Ct. 1384, 1391 (1989). The statute and the DOT regulations were not only designed to insure safety of the public, to insure individual privacy, and to prevent drug use among the drivers by

unannounced, random testing, but to rehabilitate those drivers.

The *First Pacific* court then went on to state "[b]ecause shareholders of the institution in receivership are given, as a special class, a statutory right of access to the required information, we conclude that 'the customary legal incidents'... of a special class's right to a report would follow." 224 F.3d at 1123.

Here, both Petitioner and the employer Mohawk can receive copies of the drug test under § 40.37. The general public, however, cannot receive copies of the test results. Thus, as both parties are given right of access to the information that is required under the statute, and individuals and employees are specifically named, Petitioner is a member of the class.

2. Is there any indication of Congressional intent to create or deny a remedy?

The *First Pacific* court found that the absence of a statement of intent to create a remedy does not mean no remedy is available, indeed, there would have been no need for this Court to create an implied private right of action. 224 F.3d at 1124. The *First Pacific* court relied upon *Transatlantic Mortgage*,[4] wherein this Court interpreted a provision in 15 U.S.C. § 806-15 which reads "[a]ny condition, stipulation, or provision binding any person to waive

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[4] *Transatlantic Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979).

compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void" to allow the High Court to find a limited private right of action. *First Pacific*, 224 F.3d at 1124-25. Similarly, in *Parry*, the DOT regulation can be construed to permit some type of limited private remedy since negligence cannot be waived. (*Section 40.25 (22)(ii)*) In contrast, in the *Oliver*[5] case, the statute in question specifically emphasized congressional intent to settle claims "without litigation." *First Pacific*, 224 F.3d at 1125.

Further, the *First Pacific* court stated the Congress' silence as to permitting or rejecting an individual's right to enforce the statutory requirement does not indicate that a private remedy is unavailable. *Id.* Applying this logic to the instant case, it would appear that to enforce the duties imposed by the statute, there must be an intended private right of action available to the employees.

3. Is a private right of action consistent with the purposes of the Act?

The *First Pacific* court analyzed the third inquiry prong and determined that there was no elaborate administrative scheme to enforce the regulations, therefore, a private right of action may be applied. *Citing Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451 (1981); 224 F.3d at 1126. *See contra Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085 (1985)

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[5] *Oliver v. Sealaska Corp.*, 192 F.3d 1220 (9th Cir. 1999).

(the presence of six statutory enforcement provisions provided evidence that Congress did not intend any other means of enforcement). "However, where no enforcement mechanism is explicitly provided by Congress or an administrative agency, it is appropriate to infer that Congress did not intend to enact unenforceable requirements." *First Pacific*, 224 F.3d at 1126. *See also Barlow v. Martin-Brower*, 2000 WL 32027 (6th Cir.)(STAA provides the exclusive equitable administrative remedies of back pay and reinstatement for drivers who refused to drive unsafe vehicles).

Here, the statute states specific protections (*i.e.*, proper handling, confidentiality, and rehabilitation), and specific entities, including employees, are expected to benefit from it.[6] Therefore, it can be argued that allowing employees a private right of action is consistent with the goals of the statute.

4. Is the cause of action traditionally relegated to state law?

Here, the district court specifically found that the

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[6] "A Senate Report to an earlier version states of the Act states that 'to ensure complete protection of those employees tested, the reported bill directs that a portion of each sample be retained as a control in the event that any question should arise with respect to the proper identification and chain of custody of that sample.'S.Rep.No. 54, 102d Cong., 1st Sess. 32 (1991)." *Citing Int'l Brotherhood of Teamsters v. Federal Highway Admin*, 312 U.S. App. D.C. 278, 282, 56 F.3d 242, 246 (D.C. Cir. 1995).(emphasis added)

federal statute preempts state law. Further, "[a] state or local government may not prescribe or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section" (*49 U.S.C. § 31306(g)*), therefore, the fourth inquiry must be answered in favor of drivers like Parry.

In its decision, the Sixth Circuit failed to analyze the statute under the four-prong test and instead concluded that the statute was a general mandate to establish drug testing regulations and not to address the concerns of a specific class of persons. (App. B-17 to B-19)

B. There are no administrative enforcement mechanisms available to aggrieved drivers, thereby leaving individuals without a remedy.

The "Defendants [relied] on *Solomon v. Roche Compuchem Laboratories, Inc.*, 909 F.Supp 126 (E.D.N.Y. 1995) in support of their claim that Section 40.25(f)(22)(ii) does not provide for a private cause of action." (App. B-18 to B-20) However, the *Hall*[7] court and *Salomon* court also summarily dispense with the issue of an implied private right of action under the applicable statutes by stating that administrative enforcement mechanisms are available to plaintiffs. However, in examining Section 386.12, it becomes

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[7] *Hall v. United Labs, Inc.*, 31 F.Supp.2d 1039 (N.D.Ohio 1998).

clear that the only remedy for a violation of the DOT regulations is that the individual can report the violation. If the complaint is viable, in that the complaint presents reasonable grounds for investigation and action, the Associate Administrator will then issue a notice of investigation under § 386.11(c). If the violation has merit, and after an administrative investigation, is conducted, the Associate Administrator may then issue a compliance order and/or monetary penalty against the motor carrier. *§ 386.11(c).*

Nowhere within the these regulations concerning investigations, complaints and/or compliance are there provisions for remedies for a driver like Petitioner and/or owner/operators subjected to injury from these testing programs when the DOT regulations are not followed. Taken to its logical conclusion, for example, a driver's specimen may be tested by a litmus strip by the employer's agent, the agent then states that the specimen was positive for drugs and terminates the driver from his job. Following the administrative enforcement scheme outlined in the regulations cited above, the employer could be issued a compliance order and/or is assessed a monetary penalty. However, the driver still remains terminated as there are no remedies within the regulations for the driver.

It is inconceivable that this was the legislative intent when these comprehensive DOT regulations also address the rehabilitation of drivers who test positive and drivers' education for testing and on substance abuse. For example,

the drug testing law mandates that drivers receive information explaining drug testing, including:

> The **procedures that will be used to test** for the presence of alcohol and controlled substances, **protect the driver and the integrity of the testing procedures, safeguard the validity of the test results**, and **ensure that those results are attributed to the correct driver**. *49 C.F.R. § 382.601(b)(6).* (emphasis added)

The mandatory disclosure in Section 382.601, on its face, reveals an intention to specially benefit and protect drivers. It requires that drivers be informed as to the standards governing testing, and the standard by which they can expect to be treated. This provision mandates notice, a benchmark of due process, and by definition is intended to protect and benefit drivers and/or owner/operators. Similarly, it serves to reassure drivers that they will receive fair treatment and evidences a distinct concern for the benefit of drivers and their peace of mind in testing procedures.

C. The text of the regulations support the premise that an implied private right of action exists to protect employees.

It is, therefore, Petitioner's continued contention that DOT regulation § 40.25 addressed the issue of liability and

that, in fact, a driver could maintain a cause of action against the employer and its' representatives under the statute and Section 40.25, through an implied right of action.

Additionally, the text of the regulations acknowledges consistently the inevitability of both testing errors as well as litigation against those who carry out DOT-mandated testing. Section 40.29(g)(3) provides that during litigation "arising from" drug testing, disclosure of otherwise confidential information is authorized. *See also Section 40.35* (mentioning claims "arising from" drug tests). Section 40.25 expressly protects drivers and/or owner-operators from having to waive the liability which belongs to the drug testing industry. This provision is positive evidence that liability exists and that litigation is not foreclosed.

The agency's interpretation of the regulations also presumes the testing industry faces liability for its actions:

> The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling, or analysis of the specimen or to indemnify any person for the negligence of others.' **The intent of this statement is to prevent anyone who participates in either the collection, handling, or analysis of the specimen from trying to require the employee to exempt them from liability**

> **arising from their actions. This pertains not only to collection site and laboratory personnel, but also to MRO's, their staff, if applicable, and to the employer.** *U.S. DOT May 4, 1997 Interpretation of Section 40.25*, at Question 9 (emphasis added).

Ironically, in *Hall*, upon which the lower courts and the Defendants extensively rely, the court found that "employers are responsible for the compliance of their officers, employees, agents consortia and/or contractors with the requirements of this part. 49 C.F.R. § 40.1" *Hall*, 31 F.Supp.2d at 1043. *A fortiori*, if there exists a duty of care, a claim for negligence or other causes of action should be inferred.

Therefore, employees subjected to mandatory drug testing which fails to comport with federal regulations should be able to maintain a cause of action against industry actors under the statute and regulations when DOT mandated drug testing is conducted in bad faith, negligently, or not in accord with strict DOT regulations created for their protection and privacy. Petitioner urges that this Court find an implied right of action under the statute and/or the regulations.

II.

PETITIONER SUFFICIENTLY ALLEGED CONSTITUTIONAL VIOLATIONS IN ORDER TO SUSTAIN A *BIVENS* ACTION IN HIS FIRST AMENDED COMPLAINT.

The Sixth Circuit was correct in stating "[t]he facts underlying the § 1983 claim [in the original complaint] are not the basis for his *Bivens* claim, which arose from the administration of his drug test" (App. B-13), in Petitioner's attempt to amend his complaint for a second time. However, Petitioner is not relying upon his original § 1983 action to allege a *Bivens* action. To sustain a *Bivens* action, Petitioner need only plead facts sufficient to state a claim for violation of his constitutional rights, which he has done in Counts III, IV, VII, IX,[8] and X in his amended complaint, alleging violations of Petitioner's constitutional rights and safeguards in not conducting the drug test according to regulations. Thus, Defendants were given sufficient and fair notice of Petitioner's constitutional legal theory in his first amended complaint in

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[8] "Defendants violated all federal regulations promulgated by the Secretary of Transportation declared and enforceable pursuant to Section 49 U.S.C.§31306 *et seq.*, for the protection of Plaintiff's constitutional rights and safeguards to conduct drug testing according to law. Defendants' acts were willful and malicious in that Defendants' conduct was carried on with a conscious disregard for the reputation and rights of the Plaintiff, Christopher Parry." (Plaintiff's Amended Complaint, p 11; referred to in App. C-5)

that his constitutional rights were violated when his random drug test was not conducted properly according to the federal regulations, and, therefore, was unreasonable.

Parry argues that when there is an abuse of process, the random test and request for a second test becomes an unreasonable search and seizure under the Fourth Amendment. Petitioner's first test was inherently unreasonable due to the various procedural problems, i.e., time delay in taking temperature, altering chain of custody forms, leaving specimen unattended, ear thermometer placed in urine for temperature measurement, specific gravity being measured in technician Carter's hand, request for an immediate second test, etc., and, thus, constituted an unreasonable search in violation of the Fourth Amendment for which a *Bivens* action may apply.

Thus, allowing Petitioner to file a second amended complaint would not be futile since, under *Bivens*, Parry has sufficiently alleged an abuse of process and can prove a violation of his constitutional rights by Defendants testing his urine for illegal drugs in violation of the safeguards of protocol to ensure an accurate result under the federal regulations, and demanding an unreasonable, unnecessary and unsupported second drug test after the first test was concluded.

Here, Petitioner is contending regardless of his inartful pleadings that his constitutional right to be free from unreasonable search and seizure was violated since an

improperly conducted test is unreasonable, and, further, that a demand for a second test was even more unreasonable since it did not comport with federal regulations.[9]

Further, Petitioner asserts that he was denied due process. He claims his test was not conducted fairly, tested accurately and integrity was comprised. Among other claims, Petitioner alleges that his employer interfered with his test by issuing confusing and conflicting instructions. The opinion of the district court also suggests a lack of notice to the driver that the consequence of leaving the collection site would be judged to interfere with a second test and therefore be considered a "refusal to test," which is deemed positive for drugs under the regulation. In fact the opinion below seems to underscore that the collection site, employers and others were utterly confused as to the consequence of the driver leaving the site and no regulations are cited. There is also no indication that the driver was given an opportunity to explain why he left the collection site or to challenge the decision that he was forbidden from taking a second test or to question why the second test was necessary.

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[9] Parry continues to maintain that he did not know that he was to remain on-site for a second test and before the test was administered. Defendant Austintown ER pieced that alleged fact together from a series of answers to deposition questions and still maintains that Parry knew he was to be re-tested and thus must stay at the facility.

A. Petitioner's first random drug test was improperly conducted under DOT regulations, and, therefore, an unreasonable search and seizure, and, further, the demand for a second unnecessary test was an unreasonable search and seizure.

In *Stueart v. Arkansas State Police Commission* (1997), 329 Ark. 46, 945 S.W.2d 377, the Arkansas Supreme Court properly applied a framework of analysis which supports Petitioner's contention that he was subject to an unreasonable search, i.e., improperly conducted drug test. The *Stueart* court stated:

> The rights that were prejudiced in this case were indeed substantial. Although the United States Supreme Court has definitively approved drug testing, even when conducted without a reasonable suspicion that the subject is "using," the Court has said that the collection and testing procedure must satisfy reasonableness requirements in order to protect the employee's constitutional rights. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

> For such a test to be "reasonable," it must be reasonably related to the objectives of the test "as actually conducted " *National Federation of Fed. Employees v. Weinberger*, 818 F. 2d 935 (D.C. Cir. 1987). We find the following guidelines instructive in determining whether a methodology of drug testing meets the reasonableness requirement:
>
> In determining whether the searches 'as actually conducted" were reasonable, the methodology of the searches must be examined in relation to the goals of the drug testing methods. If the testing is not conducted in ways in which there is absolute confidence in the reliability of the results, then the purposes of testing are not secured. Treating someone for drug abuse who is not a drug user is counter-productive, as is disciplining someone who is not a drug user.... It is critical that testing procedures be accurate and reliable.' *52 Kevin B. Zeese, Drug Testing Legal Manual, s 5.01 [3] [d] at 5-18.39 (1995).

Stueart clearly had substantial rights that were placed at risk by the screening for drugs. Not only did he have a right to

standards of reasonableness under the Fourth Amendment and under the Due Process Clause, but he also had a substantial interest in continued employment. Adherence to the procedure adopted by the agency to ensure absolute confidence in the reliability of the results was essential to protect these substantial interests. However, in affirming Stueart's dismissal, the Commission ignored its own requirement that the results be confirmed by a medical review officer. This failure to follow its own rules deprived Stueart of the rights that the procedure was designed to protect. *Stueart*, 945 S. W. 2d at 380.

In *Drake v. Delta Airlines, Inc.*, 923 F.Supp. 387 (E.D.N.Y. 1996)(*Drake I*), the court examined Drake's challenge to his initial drug test and stated that "the Fourth Amendment would be implicated because that test was mandated by the FAA's drug testing regulations." *Id.*, p. 396. The court went on to state that finding the Fourth Amendment implicated by Delta's search for adulterants does not end the inquiry, however, since the Amendment prohibits unreasonable searches. "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381...(1985)." *Id.*

Thus, the *Drake I* court went on to state that "[t]o the extent Drake retained any privacy interest in his urine sample after it had been tested the first time, that interest was

minimal. There was no further physical invasion necessitated by testing his urine for adulterants or any involvement of Drake at all." *Id.* at 396-7. Thus, the court held the search to be reasonable. The circuit court on review, however, stated that "[i]f Drake's complaint is construed to raise objections not only to the second test for adulterants, but also to the original drug test itself, we can not say that 'it appears beyond doubt that the plaintiff can prove no set of facts to support his claim[.]'" *Drake v. Delta Air Lines, Inc.*, 147 F.3d 169 (2nd Cir. 1998)(*Drake II*). The Second Circuit court went on to hold that liberally construed, Drake's complaint alleged that the original drug test by the airline, carried out under the authority of the Federal Aviation Administration's mandatory drug testing regulations, was not randomly administered, and thus this allegation was sufficient to state a legally cognizable Fourth Amendment claim. *Id.*

Petitioner is not contending that the first test was not randomly administered. Rather, Petitioner is contending that his first test was inherently unreasonable due to the various procedural problems, i.e., ear thermometer placed in urine for temperature measurement and time lapse, altered custody and control forms, specimen left unattended, conflicting instructions to leave the site by employer, specific gravity impossibly being measured in technician Carter's hand, etc. Further, based on non-existent regulations, the technician

wanted to have Parry take a second intrusive test.[10] Thus, the demand for a second test was more unreasonable and constituted an unreasonable search in violation of the Fourth Amendment for which a *Bivens* action may apply.

The Sixth Circuit summarily dismissed Petitioner's claim by stating that taking a single random drug test was reasonable in this safety sensitive industry. (App. B-15) However, the court failed to even analyze Parry's argument that the technician's failure to follow DOT procedures caused the random test to be unreasonable. The court of appeals also found that low specific gravity and creatinine levels did not result in disqualification of the driver, only that the employer had the option of requiring an observed specimen in subsequent tests. (App. B-8 to B-9)

This finding clearly suggests that the request for an immediate second drug test was unnecessary and unreasonable. Further, under the regulations technician Carter could not have requested that Petitioner stay to provide another specimen in light of the temperature and gravity readings. Yet, Carter did so, thereby subjecting Petitioner to a second, non-random intrusive test. Unfortunately, when Petitioner failed to take the second test immediately after the

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[10] The regulations do **not** state that the donor remain at the collection site. Thus, not only was the first test unreasonable, but the second test would have certainly been unreasonable since it was not part of a systematic program of testing.

first he was disqualified and could not drive for Mohawk. Petitioner urges this Honorable Court to find that the first test was an unreasonable search and the demand for a second test to be an unreasonable search and seizure for which a *Bivens* action may apply.

CONCLUSION

For all of the foregoing reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit, and, ultimately, to vacate and reverse the order below and remand the matter to the district court for trial. Without such an order, employees subject to mandatory drug testing which is not conducted according to the regulation safeguards will be subjected to unreasonable and non-compliant administrative searches without any remedy at law, while at the same time relinquishing their constitutionally protected rights to privacy and freedom from unreasonable search and seizure.

Respectfully submitted,

Timothy J. Grendell
Grendell & Simon, Co., L.P.A.
Attorneys for Petitioner
6644 Harris Road
Broadview Hts.Ohio 44147
(440) 746-9600

Natalie F. Grubb
Counsel of Record
Attorney for Petitioner
437 W. Lafayette Road
Suite 260-A
Medina, Ohio 44256
(330) 725-7252

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

6th Circuit
Court of Appeals
Filed 1/31/01
Leonard Green,
Clerk

CHRISTOPHER J. PARRY,
Plaintiff-Appellant,

vs. **CASE NO. 99-3924**

MOHAWK MOTORS OF MICHIGAN, INC.; AUSTINTOWN AMBULATORY ER; MEDEXPRESS; DRUG FREE, INC.,
Defendants-Appellees.

ARNOLD J. PRITCHARD; APIC; DIVERSIFIED CONTRACT SERVICES, INC.
Defendants.

BEFORE: JONES, SILVER and CLAY, CIRCUIT JUDGES

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT
s/s Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

NANCY J. BARNES
(513) 564-7022

Filed: January 31, 2001

Natalie F. Grubb
437 W. Lafayette Road
Suite 260-A
Medina, OH 44256

Laura J. Avery
Reminger & Reminger
113 St. Clair Avenue
Suite 700
Cleveland, OH 44114-1273

Steven J. Hupp
Bonezzi, Switzer, Murphy & Polito
526 Superior Avenue
Suite 1400 Leader Building
Cleveland, OH 44114-1491

D. Faye Caldwell
Caldwell & Clinton
1001 Fannin
Suite 2200
Houston, TX 77002

Kathryn M. Miley
Wilkerson & Associates
1422 Euclid Avenue
Suite 248
Cleveland, OH 44115

Diana E. Stein
Cullen Law Firm
1101 30th Street, N.W.
Suite 300
Washington, DC 20007

RE: 99-3924
Parry vs. pritchard
District Court No. 98-00179

Enclosed is a copy of an order which was entered today in the above-styled case.

(Ms.) Nancy Barnes
Case Manager

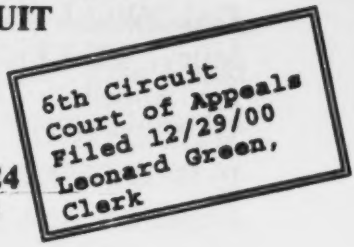
Enclosure

cc: Honorable John M. Manos
Ms. Geri M. Smith

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0420P (6th Cir.)
File Name: 00a0420p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



CHRISTOPHER J. PARRY,
Plaintiff-Appellant,

CASE NO. 99-3924

vs.

MOHAWK MOTORS OF MICHIGAN, INC.; AUSTINTOWN AMBULATORY ER; MEDEXPRESS; DRUG FREE, INC.,
Defendants-Appellees.

ARNOLD J. PRITCHARD; APIC; DIVERSIFIED CONTRACT SERVICES, INC.
Defendants.

Appeal from the United States District Court for the
Northern District of Ohio at Cleveland.
No. 98-00179--John M. Manos,
District Judge.

Argued: September 15, 2000

Decided and Filed: December 29, 2000

Before: JONES, SILER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Natalie F. Grubb, Medina, Ohio, for Appellant. Laura J. Avery, REMINGER & REMINGER, Cleveland, Ohio, Douglas G. Leak, BONEZZI, SWITZER, MURPHY & POLITO, Cleveland, Ohio, D. Faye Caldwell, CALDWELL & CLINTON, Houston, Texas, Kathryn M. Miley, WILKERSON & ASSOCIATES, Cleveland, Ohio, for Appellees. Joseph Black, CULLEN LAW FIRM, Washington, D.C., for Amicus Curiae. ON BRIEF: Natalie F. Grubb, Medina, Ohio, for Appellant. Richard C. Haber, REMINGER & REMINGER, Cleveland, Ohio, Steven J. Hupp, BONEZZI, SWITZER, MURPHY & POLITO, Cleveland, Ohio, D. Faye Caldwell, CALDWELL & CLINTON, Houston, Texas, Francis Daniel Balmert, VORYS, SATER, SEYMOUR & PEASE, Cleveland, Ohio, Kathryn M. Miley, Ernest L. Wilkerson, Jr., WILKERSON & ASSOCIATES, Cleveland, Ohio, for Appellees. Paul D. Cullen, Sr., Diana E. Stein, CULLEN LAW FIRM, Washington, D.C., for Amicus Curiae.

OPINION

CLAY, Circuit Judge. Plaintiff, Christopher J. Parry, appeals from the district court's order granting summary judgment to Defendants, Mohawk Motors ("Mohawk"), Austintown Ambulatory ER ("Austintown"), MedExpress, and Drug Free, Inc. ("Drug Free") and denying Plaintiff's motion to file a second amended complaint. Plaintiff claims that the district court erred by (1) denying him leave to amend his complaint to include a Bivens claim; (2) concluding that he did not have a private cause of action under the regulations promulgated pursuant to the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"), 49 U.S.C. § 31306; (3) concluding that he was not wrongfully terminated under the Americans with Disabilities Act, 42 U.S.C. § 12101 ("ADA") and Ohio public policy; and (4) concluding that he did not have a cause of action under Ohio state law for defamation or invasion of privacy. Moreover, Plaintiff claims that the district court erred in granting summary judgment to Defendants Mohawk, Drug Free, MedExpress and Austintown while at the same time imposing a stay under the Bankruptcy Code in Plaintiff's case against Defendants Pritchard and APIC. For the reasons stated below, this Court AFFIRMS the district court's orders granting summary judgment and denying Plaintiff's motion to file a second amended complaint.

BACKGROUND

On July 11, 1996, Plaintiff signed a contract with Defendant Arnold J. Pritchard and Pritchard's company, Defendant APIC, to drive on their behalf. Defendant Pritchard leased drivers and trucks to Defendant Mohawk. Mohawk acted as the carrier and dispatched leased drivers for particular runs. Defendant Pritchard signed an agreement with Mohawk stating that his drivers would participate in a drug testing program as mandated by federal law.

On August 6, 1997, Plaintiff was selected for a random drug test. Plaintiff received instructions to proceed to a terminal in Lordstown, Ohio because that location was the most convenient. At the Lordstown terminal, Plaintiff was given a Federal Drug Testing Custody and Control Form ("CCF") and a testing kit. Plaintiff was then instructed to drive to Defendant Austintown, a clinic and emergency room, for collection of his specimen.

Wendy Carter, a technician for Austintown, supervised Plaintiff's urine collection. The CCF indicates that the collection process began at 12:15 p.m. on August 6, 1997. Initially, Carter indicated that the temperature of Plaintiff's specimen was "in range." However, she testified during her deposition that Plaintiff's specimen "felt hot." Pursuant to

instructions from her supervisor, she took the temperature of Plaintiff and his specimen. Carter's notes indicate that Plaintiff's body temperature was 98.2 degrees Fahrenheit while Plaintiff's urine specimen was 104.6 degrees Fahrenheit. Additionally, Carter determined that the specific gravity of the specimen was about 1.0, indicating that the specimen was too clear for normal urine.

Although the specimen temperature did not match Plaintiff's body temperature, Carter sealed and boxed the specimen to ship to the laboratory for testing. She testified that her notes were written down after the specimen was boxed. By this time, Plaintiff had been given a copy of the CCF. In addition, three copies of the CCF were sealed in the box with the specimen. Carter altered the copies of the CCF to indicate that the specimen was not within the proper temperature range. Because various carbon pages had already been separated, the alteration did not appear on all copies. Carter stated that she initially indicated a normal temperature on the CCF because she had never encountered an abnormal specimen before and assumed that Plaintiff's specimen would be normal as well.

After the collection, Plaintiff was taken to an alcohol technician for an alcohol breath test. Carter testified that she told both the alcohol technician and Plaintiff that he could not leave because another urine specimen was

required in light of the temperature and specific gravity readings of Plaintiff's earlier specimen. Plaintiff testified that during the course of events, "[he] knew [he] had to stay at the facility." (J.A. at 627.) After the alcohol test, Plaintiff was escorted to the waiting area near the reception desk.

At approximately 12:50 p.m., Carter went into the reception area and observed Plaintiff re-entering Austintown from the outer doors of the emergency room. She had a conversation with Plaintiff in which she explained to Plaintiff that he could not give a second specimen because he had left the facility. Although Carter's notes indicate two specimens were taken and the second was observed by a doctor, the notes also indicate that Plaintiff left before the second specimen could be taken. Carter explained the discrepancy by stating that the initial statement was written down based on Plaintiff's agreement to give a second specimen. He left the facility, however, before she or a doctor actually had an opportunity to take the second specimen.

Subsequently, Plaintiff made a phone call to Defendant Pritchard for instructions and spoke to Pritchard's wife. After the call, pursuant to Plaintiff's employer's instructions, Carter was directed to send the first specimen for testing. Plaintiff's phone call and Pritchard's instruction

are reflected in Carter's notes. Plaintiff then left Austintown.

At approximately 2:05 p.m., Plaintiff returned to Austintown again with the intention of giving a second specimen. Carter instructed him to wait while she determined whether he could give a second specimen. She contacted Linda Campbell of Central Transport. Campbell informed Carter that because he had left the facility, a second specimen could not be taken because under the regulations, leaving constituted a "refusal to test." Campbell then advised her supervisor, Randall Fields, that there was a problem with Plaintiff's drug test. In a subsequent conference call between Carter and Fields and/or Campbell, Campbell reiterated that a second sample could not be taken. They instructed Carter to send the original specimen and explained to Plaintiff that he should contact Defendant Pritchard for further instructions.

On August 7, 1997, MedExpress received and tested Plaintiff's urine specimen for drugs. The specimen was also tested for specific gravity and creatine level. The specimen tested negative for drugs, but had a specific gravity and creatine level below that required by the regulations. Although this did not mean that a driver was disqualified, it did mean that a driver could be required to give an "observed" specimen in a subsequent test. The

results were reported to Defendant Drug Free, the Medical Review Officer ("MRO"), for review.

Drug Free received the results on August 7 or 8, 1997. Dr. James Haber, an employee of Drug Free was the physician who acted as the MRO for Plaintiff's case. He testified at his deposition that negative results ordinarily receive an administrative review. Negative results are also not discussed with the employer. Dr. Haber only recalled discussing the results with David Eades, the president of Drug Free.

Eades testified at deposition that the motor carrier is notified of a low specific gravity or creatine level even if the tests are negative. The reporting is necessary to permit the employer to require an observed specimen in subsequent tests. Eades also testified that he has discussed negative results with employers when problems with the collection process were brought to his attention.

Fields and Campbell contacted Eades within days of Plaintiff's test. They were concerned about whether it was proper to send a "hot" specimen out for testing. Eades explained that all specimens, regardless of temperature, must be tested under federal regulations. They also inquired as to the ramification of the low specific gravity and creatine level. Eades further explained that this did not

result in disqualification, but the employer had the option of requiring an observed specimen in subsequent tests. Eades instructed his employees to look into the matter further; the employees in turn contacted Austintown and MedExpress for their version of events. Between August 13 and 18, 1997, the parties faxed information to each other surrounding the circumstances of Plaintiff's drug test.

Carter testified that any subsequent inquiries about Plaintiff were referred to Fields. Other than these referrals, she did not have any substantive discussions with anyone about Plaintiff. Fields and Campbell testified that they did not talk about Plaintiff to others.

Plaintiff no longer drives for Pritchard or Mohawk. Plaintiff was terminated because he allegedly took Defendant Pritchard's tractor across state lines without permission. When other truck owners and operators made inquiries, Fields and Campbell responded by providing only general information about Plaintiff, including his employment dates, whether there was a positive result in previous drug tests, and the last date of his test.

Plaintiff commenced this action on January 27, 1998. On April 16, 1998, Mohawk filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On August 8, 1998, Mohawk converted its motion to dismiss

into a motion for summary judgment pursuant to Federal Rule Civil Procedure 56. On June 4, 1998, MedExpress filed a motion for summary judgment. Drug Free and Austintown filed motions for summary judgment on July 21 and 31, 1998, respectively.

The district court conducted a pre-trial conference on August 4, 1998, where it suspended discovery and indefinitely postponed the trial pending its ruling on the dispositive motions. On September 9, 1998, Defendants Pritchard and APIC filed notice of Chapter 7 Bankruptcy.

On September 16, 1998, Plaintiff filed his first amended complaint. On September 28, 1998, Plaintiff filed a combined response to Defendants' motions for summary judgment. The district court granted summary judgment to all Defendants and stayed the proceedings as to Defendants Pritchard and APIC pursuant to the automatic stay provisions of the Bankruptcy Code on March 25, 1999. Plaintiff filed a motion for reconsideration on April 15, 1999. The district court denied Plaintiff's motion for reconsideration on April 26, 1999. Thereafter, Plaintiff filed a motion for leave to file a second amended complaint on June 8, 1999. The district court denied Plaintiff's motion on June 18, 1999. On July 15, 1999, Plaintiff filed a motion to certify the interlocutory grant of summary judgment for appeal to this Court.

DISCUSSION

I.

A. Standard of Review

We generally review a district court's denial of a motion to amend a complaint for abuse of discretion. *See United States v. Midwest Suspension & Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995). However, when the district court's decision is based on a legal conclusion that the proposed amendment would be futile, we review the denial of the motion to amend *de novo*. *See Hahn v. Star Bank*, 190 F.3d 708, 715-16 (6th Cir. 1999). In the instant case, the district court denied Plaintiff's motion to amend on the ground that it was untimely, prejudicial and futile. We will therefore review the district court's decision for abuse of discretion except to the extent it held that Plaintiff's amendment would be futile, which we review *de novo*.

B. Analysis

Plaintiff argues that the district court erred by denying his motion to file a second amended complaint. In his proposed second amended complaint Plaintiff sought to add

a claim under Bivens.[1] We hold that the district court properly denied Plaintiff's motion to amend his complaint.

Federal Rule of Civil Procedure 15(a) provides that a district court shall freely grant leave to amend a complaint when justice so requires. *See* Fed. R. Civ. P. 15(a). Nevertheless, the party requesting leave to amend must "act with due diligence if it wants to take advantage of the Rule's liberality." *Midwest Suspension & Brake,* 49 F.3d at 1202.

At the outset, we note that Plaintiff's June 8, 1999 motion to amend his complaint came almost nine months after he filed his first amended complaint and well over a year after he filed his original complaint. Moreover, at the time Plaintiff filed his motion to amend, the district court had granted summary judgment to Defendants two and one-half months earlier as well as denied Plaintiff's motion for reconsideration.

Plaintiff in the instant case argues that a § 1983 claim, raised in his original complaint but deleted from his first

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[1]A Bivens action is an action for damages arising out of a violation of one's federal constitutional rights by another acting under color of federal law. *See Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971).

amended complaint, was similar to the *Bivens* claim that he now wishes to assert inasmuch as the § 1983 claim alleged a "constitutional" claim in a "general sense." He argues that this similarity affords Defendants sufficient and fair notice. Plaintiff's argument is flawed for two reasons. First, the § 1983 claim alleged in Plaintiff's original complaint arose from Defendant Pritchard's purported filing of a false police report in which Pritchard accused Plaintiff of stealing Pritchard's truck by driving it across state lines to New York. The facts underlying the § 1983 claim are not the basis for his *Bivens* claim, which arose from the administration of his drug test. Thus, Plaintiff's argument that the two actions are similar enough to provide Defendants sufficient and fair notice is artful, but unpersuasive. Second, Plaintiff's first amended complaint, not his original complaint, was the legally operative complaint for purposes of his motion to amend. *See In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir. 2000) (when plaintiff files amended complaint, new complaint supersedes all previous complaints and controls case from that point forward); *Massey v. Helman,* 196 F.3d 727, 735 (7th Cir. 1999) (same). Therefore, Plaintiff is effectively attempting to add a new legal theory after the grant of summary judgment and denial of his motion for reconsideration. We therefore conclude that Defendants did not have fair notice of the *Bivens* claim and would be prejudiced by the addition of this new legal theory nine

months after the filing of the first amended complaint. *See Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999) (allowing amendment would create prejudice to defendants in having to reopen discovery and prepare a defense for a claim quite different from sex-based retaliation claim that was before the court); *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989).

Moreover, we agree with the district court that Plaintiff's amendment would be futile inasmuch as he has not stated a claim under Bivens. This Court has previously determined that a *Bivens* claim, under appropriate circumstances, may be brought against a private corporation that engages in federal action. *See Hammons v. Norfolk S. Corp.*, 156 F.3d 701, 704 (6th Cir. 1998); *see also Malesko v. Correctional Servs. Corp.*, 229 F.3d 374, 2000 WL 1483346, *5-7 (2d Cir. Oct. 06, 2000) (citing *Hammons, supra*). Nevertheless, in order to state a claim under *Bivens*, Plaintiff must allege that there was federal action in contravention of a constitutional right. *See Hammons*, 156 F.3d at 704. We do not decide whether Defendants' actions constitute federal action for purposes of a *Bivens* claim because, even assuming that they did, Plaintiff has failed to allege and we do not believe that Plaintiff can allege and prove a violation of his constitutional rights. Although Plaintiff has not alleged a violation of any specific constitutional right, this Court assumes, based on the facts,

that Plaintiff would argue that his Fourth Amendment right against unreasonable searches was violated by the random drug test that he was required to take. Under the circumstances of this case, where Plaintiff, who occupies a safety sensitive position, was randomly chosen pursuant to federal regulations to take a single drug test and there is no showing of abuse of that process, we would not find a Fourth Amendment violation. *See Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602 (1989) (holding that random, systematically applied drug tests conducted under federal regulations to ensure safety did not violate Fourth Amendment prohibition against unreasonable searches); *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989) (same); *Drake v. Delta Air Lines, Inc.,* 147 F.3d 169 (2d Cir. 1998).

Therefore, we conclude that the district court properly denied Plaintiff's motion to amend his complaint.

II.

A. Standard of Review

We review the district court's order granting summary judgment *de novo. See Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 572 (6th Cir. 2000). Summary judgment is appropriate where there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

B. Analysis

1. Plaintiff's Claim Under the FOTETA

On appeal, Plaintiff argues that the district court erred when it concluded that Plaintiff did not have an implied private cause of action pursuant to 49 C.F.R. § 40.25, a regulation promulgated under FOTETA. This Court holds that the district court properly analyzed Plaintiff's claim and properly concluded that an implied private cause of action does not exist under 49 C.F.R. § 40.25 or FOTETA.

The regulation upon which Plaintiff relies reads in pertinent part:

> The employee may not be required to waive liability with respect to negligence on the part of any person participating in the collection, handling or analysis

> of the specimen or to indemnify any person for the negligence of others.

49 C.F.R. § 40.25 (f)(22)(ii). The statute under which the regulation was promulgated, FOTETA, provides that the Secretary of Transportation shall prescribe regulations to establish drug testing programs "[i]n the interest of commercial motor vehicle safety." 49 U.S.C. § 31306. In addition, the regulations provide that "[t]he purpose . . . is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles." 49 C.F.R.§ 382.101.

In *Cort v. Ash,* 422 U.S. 66, 78 (1975), the Supreme Court articulated a four-part test to determine whether an implied right of action exists in a federal statute. The four-part test established in *Cort* requires that the court consider: (1) whether plaintiffs are among the class of persons intended to benefit from the enactment of the statute; (2) whether there is any evidence of legislative intent to provide or deny a private remedy; (3) whether a private remedy would be consistent with the underlying purposes of the legislative scheme; and (4) whether the action is one traditionally delegated to state law so it would be inappropriate to imply a federal remedy. 422 U.S. at 78. Since the issuance of *Cort,* however, the Supreme Court has

refined this inquiry and the focal point is whether Congress, expressly or by implication, intended to create a private cause of action. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575 (1979); *see also Thompson v. Thompson,* 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("[W]e effectively overruled the *Cort v. Ash* analysis in *Touche Ross* . . . and *Transamerica* . . ., converting one of its four factors (congressional intent) into the determinative factor."). The other Cort factors are relevant insofar as they assist in determining congressional intent. *See Touche Ross,* 442 U.S. at 575-76.

Defendants rely upon *Salomon v. Roche Compuchem Laboratories, Inc.,* 909 F.Supp 126 (E.D.N.Y. 1995) in support of their claim that § 40.25(f)(22)(ii) does not provide for a private cause of action. In *Salomon,* the plaintiff was a flight attendant for American Airlines and brought suit alleging that the defendant violated 49 C.F.R. § 40.37, the regulation governing employee access to drug testing records. The district court concluded that the statute was framed as a general mandate to the Federal Aviation Administration to establish drug testing regulations, not to address the concerns of a specific class of persons. *See id.* at 128. Other courts have similarly concluded that the regulations promulgated under 49 C.F.R. Part 40 do not provide for a private cause of action. *See, e.g., Drake v.*

Delta Air Lines, Inc., 147 F.3d 169, 170-71 (2d Cir. 1998) (affirming district court's conclusion that plaintiff did not have a private cause of action under 49 C.F.R. Part 40); *Schmeling v. NORDAM*, 97 F.3d 1336, 1343-44 (10th Cir. 1996) (concluding that 49 C.F.R. § 40.35 did not provide for a private cause of action); *Abate v. S. Pacific Transp. Co.*, 928 F.2d 167 (5th Cir. 1991) (concluding that Federal Railroad Safety Act provides no private cause of action to enforce regulations implementing federally mandated drug-testing programs set forth in 49 C.F.R. Part 40).

This Court similarly concludes that the FOTETA is framed as a general mandate to the Department of Transportation as the regulations promulgated under part 40 are applicable to the Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration and Federal Aviation Administration. *See* 49 C.F.R. § 40.25 (f)(10)(B). This regulatory scheme does not evince a concern for the protection of drivers who believe that they have been aggrieved through the drug testing process. *Cf. Drake*, 147 F.3d at 170-71; *Schmeling*, 97 F.3d at 1343-44. Furthermore, federal regulations in and of themselves cannot create a private cause of action unless the action is at least implied from the applicable statute. *See Smith v. Dearborn Fin. Servs., Inc.*, 982 F.2d 976, 979 (6th Cir. 1993). Therefore, this Court holds that the district court properly concluded that the FOTETA or the

regulations promulgated thereunder do not imply a private cause of action and properly granted summary judgment on Plaintiff's claim.

2. Plaintiff's Wrongful Termination Claim

a. Wrongful Termination under the ADA

Plaintiff next argues that the district court erred in granting summary judgment as to his wrongful termination claim under the ADA. The district court concluded that Plaintiff had failed to exhaust his administrative remedies inasmuch as it found that there was no evidence that Plaintiff had filed a charge of discrimination with the EEOC.[2] The district court further concluded that even if Plaintiff had exhausted his administrative remedies, there was no genuine issue of fact and Plaintiff's claim could not survive summary judgment. Although this Court finds that Plaintiff's failure to obtain a right-to-sue letter prior to commencing this action was not a jurisdictional defect, but

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[2]Although Plaintiff did not obtain a right-to-sue letter prior to commencing this action, he did obtain the right-to-sue letter on April 21, 1998 prior to the summary judgement motion. However, Plaintiff failed to inform the court of his receipt of the right-to-sue letter until he filed the motion for reconsideration.

rather a condition precedent which Plaintiff cured, we nevertheless conclude that the district court properly granted summary judgment as there was no genuine issue of fact and Plaintiff failed to produce evidence on which a reasonable jury could find that he was terminated in violation of the ADA.

Under the ADA, a claimant who wishes to bring a lawsuit claiming a violation of the ADA must file a charge of discrimination with the EEOC within 300 days of the alleged discrimination. *See* 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(e)(1); *Jones v. Sumser Ret. Vill.*, 209 F.3d 851, 853 (6th Cir. 2000). An employee may not file a suit under the ADA if he or she does not possess a right-to-sue letter from the EEOC because he or she has not exhausted his or her remedies. *See* 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117(a) (procedures from § 2000e-5 apply to ADA claims); *see also EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999). However, the failure to obtain a right-to-sue letter is not a jurisdictional defect; rather the right-to-sue letter is a condition precedent. *See Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th Cir. 1998). Accordingly, the requirement of obtaining a right-to-sue letter may be waived by the parties or the court. *See id.* at 1031.

In *Portis v. Ohio,* 141 F.3d 632 (6th Cir. 1998), a plaintiff brought suit against the state of Ohio under Title VII and Ohio state law for sexual discrimination. The district court dismissed the plaintiff's claim without prejudice because the plaintiff had not yet exhausted her administrative remedies because she had not obtained a right-to-sue letter from the EEOC as required by 42 U.S.C. § 2000e-5 and had not filed a charge with the Ohio Civil Rights Commission as required by 42 U.S.C. § 2000e-5(c) and 29 C.F.R. § 1601.73. *See id.* at 633. In *Portis,* the plaintiff received her right-to-sue letter one week after she filed her complaint. On appeal, the State of Ohio argued that plaintiff's failure to exhaust her administrative remedies was a proper alternative ground upon which to dismiss Plaintiff's claim. *See id.* at 634. This Court, however, rejected the State of Ohio's contention, stating that "[w]e see no reason to bar [the plaintiff's] claim solely on the grounds of a non-jurisdictional requirement whose brief absence caused Ohio no prejudice in this case." *Id.* The Court went further to hold that "the proper time for Ohio to raise this argument was between the filing of the lawsuit and [the plaintiff's] receipt of the letter." *Id.* at 635.

Here, although Plaintiff did not apprise the district court of his right-to-sue letter until his motion for

reconsideration,[3] Plaintiff had in fact received the right-to-sue letter prior to the district court's order granting summary judgment. However, as in Portis, there is no jurisdictional defect and no evidence that Defendants suffered any prejudice from Plaintiff's failure to initially satisfy this condition precedent, a defect he later cured. *See Portis,* 141 F.3d at 634. We therefore think it would be unduly harsh, under these circumstances, to deny Plaintiff his day in court as to his ADA claim; accordingly, we conclude that the district court improperly dismissed Plaintiff's claim on that basis.

Nevertheless, this Court determines that Plaintiff's claim for wrongful termination under the ADA to be without merit. To state a claim under the ADA, Plaintiff must establish a prima facie case of discrimination. *See Martin v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 934 (6th Cir. 2000). Once Plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a nondiscriminatory legitimate reason for the termination. *See id.* Provided that the employer meets this burden, Plaintiff must then show that the proffered reason

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[3]In his motion for reconsideration, Plaintiff claims that he "relie[d] on his Sur-reply(s) to both Mohawk Motors and Austintown ER wherein Plaintiff provided a copy of the EEOC charge and the Right to Sue letter . . . ." (J.A. at 1258.)

is but a pretext for discrimination. *See id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). We conclude that Plaintiff's ADA claim must fail because he cannot establish a prima facie case.

To establish a prima facie case, Plaintiff must show that (1) he was disabled" under the ADA, (2) he was otherwise qualified to perform the essential functions of the job; (3) he suffered adverse employment action; and (4) he was replaced by a nondisabled person. *See Martin*, 209 F.3d at 934. We find that Plaintiff has failed to establish the first and fourth elements of a *prima facie* case.

First, Plaintiff has failed to establish that he was or is "disabled" under the ADA. Under the ADA, a disability is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Plaintiff contends that he was administered a random drug test because his employer perceived him to be a drug user. The ADA provides protection for employees who are erroneously regarded as

current illegal drug users. See 42 U.S.C. § 12114(b)(3) (excluding erroneous perception of illegal drug use from being disallowed as a disability under § 12114(a)); *Buckley v. Consol. Edison Co. of New York, Inc.*, 127 F.3d 270, 273 (2d Cir. 1997), *vacated en banc on other grounds*, 155 F.3d 150 (2d Cir. 1998); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 831-32 (9th Cir. 1995). The erroneous perception of being an illegal drug user is to be treated like any other perception of a disability, and is only considered to be a qualifying disability if the employer actually perceives the disability to substantially limit a major life activity of the employee. *See* 42 U.S.C. § 12102(2); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 611 (10th Cir. 1998); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) (acknowledging that to prevail on a perceived disability claim, a "plaintiff must show that the perceived impairment is a substantial limitation on a major life activity").

The term "'substantially limits' means an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population." *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998) (citing 29 C.F.R. § 1630.2(j)(1)). "'Major life activities' include 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id.* (quoting 29 C.F.R. § 1630.2(i)).

Plaintiff has failed to allege any evidence that would lead a reasonable jury to conclude that Defendants regarded or "perceived" him as having a substantially limiting disability--a drug addiction. Specifically, Plaintiff has failed to produce any evidence that Defendants believed he was illegally using drugs to the extent that one or more of his major life activities were substantially limited. Plaintiff's contention, absent any evidence, amounts to the mere conjecture that he was fired because Defendants perceived him as having a drug addiction. Therefore, Plaintiff has failed to show that he is perceived as having a "disability" as defined under the ADA. Moreover, we conclude that Plaintiff has not produced any evidence to show that he was replaced by a person who was not disabled. Having failed to establish to all the elements of a *prima facie* case, we do not consider the burden-shifting analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981),[4] and, therefore, conclude that the district court

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[4]However, were we to engage in the burden-shifting analysis, we would still conclude that Plaintiff has failed to state a claim under the ADA sufficient to avoid summary judgment. Under the burden-shifting analysis, if Plaintiff had established a *prima case* of discrimination under the ADA, the burden would then shift to Defendants to produce a legitimate nondiscriminatory reason for Plaintiff's

properly granted summary judgment as to Plaintiff's ADA claim.

b. Ohio Public Policy

Generally, in order to succeed on a wrongful discharge claim in violation of public policy under Ohio law, a plaintiff must show that (1) a "clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law;" (2) that "dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy;" (3) "[t]he plaintiff's dismissal was motivated by conduct related to the public policy;" and (4) "[t]he

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termination. *See Martin v. Barnesville Exempted Vill. Sch. Distr. Bd. of Educ.* 209 F.3d 931, 934 (6th Cir. 1000). In the instant case, Plaintiff was terminated because he allegedly took his employer's truck and drove it across state lines without his employer's permission. Defendant having proffered a legitimate nondiscriminatory reason for Plaintiff's termination. Plaintiff must establish that the proffered reason is merely a pretext for discrimination. *See id.* We conclude that Plaintiff has not met this burden. Plaintiff has failed to put forth any evidence showing that the stated reason for his termination was merely pretextual. Therefore, even assuming arguendo Plaintiff could have established a *prima facie* case, we conclude that Plaintiff's claim under the ADA would nevertheless fail.

employer lacked overriding legitimate business justification for the dismissal." *Painter v. Graley*, 639 N.E.2d 51, 57 n.8 (Ohio 1994). Absent an Ohio statute expressing Ohio public policy, whether a clear public policy exists is to be determined by the courts of the state of Ohio. *See id.* at 56.

Plaintiff argues that Defendants violated the ADA and 49 U.S.C. § 31306, thereby violating Ohio public policy. As to the ADA, Plaintiff argues that since he was terminated because of a perceived drug use, his termination constituted a violation of Ohio public policy. Although there appears to be an express public policy prohibiting discrimination against disabled individuals, *see* Ohio Rev. Code Ann. § 4112.02 (substantially similar to the ADA), Plaintiff, having failed to show a viable claim under the ADA, is necessarily precluded from claiming that his termination violated Ohio public policy. *See Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 939-40 (6th Cir. 2000).

Plaintiff's argument that a violation of 49 U.S.C. § 31306 contravenes Ohio public policy is equally without merit. Section 31306 was enacted to prevent accidents and injuries resulting from the use of controlled substances and the misuse of alcohol. *See* 49 C.F.R. § 382.101. There is no indication under Ohio law, either through a pronouncement of the Ohio courts or a statute, that a violation of the procedures outlined in § 31306 resulting in

the termination of a transportation employee runs afoul of Ohio public policy. We further conclude that Plaintiff failed to present evidence to support a violation of § 31306 or that he was terminated as a result of a violation of § 31306. Consequently, we conclude that Plaintiff cannot rely on § 31306 to support a claim in tort for a violation of Ohio public policy. Therefore, the district court did not err in granting summary judgment on this claim.

3. Plaintiff's State Law Claims

a. Defamation

Plaintiff also argues that the district court erred in granting summary judgment on Plaintiff's defamation claim against Defendants. Plaintiff argues that the information that was exchanged between Defendants, surrounding the circumstances of his drug test, constituted a false publication amounting to defamation.[5] In dismissing Plaintiff's claim, the district court concluded that the statements exchanged surrounding Plaintiff's drug test were not false. This Court agrees.

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[5]A series of communications including conference calls and fax transmissions occurred between Defendants in an effort to ascertain what should be done in light of Plaintiff having left the facility before submitting a second urine specimen.

To state a claim under Ohio law for defamation, the plaintiff must show that there was: 1) a false statement, 2) defamatory to the plaintiff, 3) published to a third party, 4) by a defendant who was at least negligent, and 5) damaging to the plaintiff's reputation. *See Lansdowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979, 984 (Ohio 1987). A plaintiff must prove a defendant's negligence by clear and convincing evidence, but need only prove the other elements by a preponderance of the evidence. *See id.* at 984. In a defamation action, falsity is an essential element. *See Bruss v. Vindicator Printing Co.*, 672 N.E.2d 238, 240 (Ohio. Ct. App. 1996). Furthermore, in defending against a defamation action, it is sufficient for the defendant to show that "the imputation is substantially true, or as it is often put, to justify the 'gist,' the 'sting,' or the substantial truth of the defamation." *Nat'l Medic Servs. Corp. v. E.W. Scripps Co.*, 573 N.E.2d 1148, 1150 (Ohio Ct. App. 1989).

Here, Plaintiff contends that Defendant Mohawk's characterization of Plaintiff as "immediately disqualified," once Mohawk became aware of the circumstances surrounding his drug test, amounted to defamation. Specifically, Plaintiff points to Mohawk pulling his card from the wall of dispatchable drivers. Although it was probably more accurate to characterize Plaintiff's status as a "refusal to test," this Court nevertheless concludes that the statement does not constitute a "false" statement because in

defending against a defamation action, it is sufficient for the defendant to show that "the imputation is substantially true, or as it is often put, to justify the 'gist,' the 'sting,' or the substantial truth of the defamation." *Id.* at 1148. Here, the "gist" of the statement was that Plaintiff had not properly taken the drug test. Therefore, the statement does not constitute a "false" statement and cannot rise to the level of defamation.

In addition, even if Defendants' statements were defamatory, we conclude that they are qualifiedly privileged under Ohio law. Under Ohio law,

> "A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or where the person is so situated that it becomes right in the interest of society that he should tell third person certain facts, which he in good faith proceeds to do."

Miller v. Ohio Rehab. Servs. Comm'n, 685 N.E.2d 616, 618 (Ohio Ct. Cl. 1997) (quoting 17 Ruling Case Law, 341). To overcome this privilege, Plaintiff must produce sufficient

proof of actual malice. See id. at 619. We believe that Defendants' statements, which consisted of conference calls and fax transmissions amongst the defendant companies involved in the federally-mandated testing of Plaintiff's urine specimen, are qualifiedly privileged because they occurred during the regular course of Defendants' duties in administering drug tests and were reasonably necessary to determine what should be done regarding Plaintiff's drug testing results, the events surrounding his first urine specimen, and whether he should give a second urine sample. We further conclude that Plaintiff has failed to produce evidence of actual malice to overcome the privilege accorded these communications.

Plaintiff also contends that Defendants engaged in defamation by relating information surrounding his drug tests to prospective employers.[6] However, the evidence in

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[6]Defendant MedExpress was legally obligated to provide the quantitation at the request of the designated MRO.

> The Medical Review Officer may request from the laboratory and the laboratory shall provide quantitation of test results. The MRO shall report whether the test is positive or negative, and may report the drug(s) for which there was a positive test, but shall not disclose the quantitation of test results to the employer. Provided, that the MRO may reveal the quantitation of a positive test result

the record demonstrates otherwise. The prospective employers essentially stated that they could not hire Plaintiff because of his problems with his drug test. None of the prospective employers stated that they were ever told that Plaintiff had tested positive for drugs. Likewise, Plaintiff cannot point to any facts demonstrating that any prospective employer stated that Plaintiff tested positive for drugs or otherwise made or were told false statements regarding Plaintiff's test. Plaintiff has not demonstrated that any of the alleged statements were false. Therefore, Plaintiff cannot sustain a defamation claim because he has failed to raise a genuine issue of material fact such that a reasonable jury could find for Plaintiff; and, the district court properly granted summary judgment on this claim.

b. Invasion of Privacy

Ohio law recognizes a cause of action for the invasion of privacy in cases where there is 1) the unwarranted appropriation or exploitation of one's personality; 2) the publicizing of one's private affairs with which the public has no legitimate concern; or 3) the wrongful intrusion into

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> to the employer, the employee, or the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the employee and arising from a verified positive drug test.

49 C.F.R. § 40.29

one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *See Jackson v. City of Columbus,* 194 F.3d 737, 755 (6th Cir. 1999).

In the instant case, Plaintiff proceeds under the cause of action that allows one to recover for the public disclosure of private facts. In order to recover under this theory, a plaintiff must demonstrate that there was: "(1) a clearly private fact; (2) public disclosure of the private fact; and (3) a showing that the matter made public is one which would be highly offensive and objectionable to a reasonable person." *Greenwood v. Taft, Stettinius & Hollister,* 663 N.E.2d 1030, 1035 (Ohio Ct. App. 1995). "Publicity" means "communicating the matter to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge as opposed to 'publication' [as used in defamation cases and] meaning any communication by the defendant to a third person." *Seta v. Reading Rock Inc.*, 654 N.E.2d 1061, 1068 (Ohio Ct. App. 1995) (citation and quotation omitted).

On appeal, Plaintiff merely argues that a reasonable person would object to being accused of adulterating his specimen, refusing to test, or being disqualified for allegedly failing to follow procedures. Plaintiff also contends that a reasonable person would object to specific

gravity and creatine levels being made public. Aside from Plaintiff's failure to cite any authority in support of his claim, he has failed to demonstrate that the circumstances surrounding his drug test were communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.* at 1068. As a result, Plaintiff cannot sustain a cause of action for invasion of privacy. Accordingly, the district court properly granted summary judgment.

4. The District Court's Imposition of an Automatic Stay as to Defendants Pritchard and APIC

Finally, Plaintiff contends that the district court erred by granting summary judgment to Defendants because the automatic stay provisions of the Bankruptcy Code suspended Plaintiff's lawsuit against Defendants Pritchard and APIC. Plaintiff argues that unusual circumstances require that the district court extend the automatic stay to the solvent co-defendant companies. Specifically, Plaintiff argues that a contractual relationship existed between the co-defendants, i.e., Defendant Pritchard leased trucks and drivers to Mohawk and Mohawk contracted with MedExpress, Austintown and Drug Free to conduct the drug

testing, which warrants the extension of the stay to all defendants in the case.

A petition filed for bankruptcy operates as a stay and is applicable to the continuation of a judicial proceeding against the debtor. *See* 11 U.S.C. § 362(a)(1). The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(1) stays an "action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ."

Extending a stay to non-bankrupt co-defendants is justified only in "unusual circumstances." *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 861 (6th Cir. 1992). In *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993), this Court recognized that absent unusual circumstances the stay "does not extend . . . to separate legal entities such as corporate affiliates, partners in debtor partnerships, or to codefendants in pending litigation." In this case, Plaintiff has failed to demonstrate that "unusual circumstances" warrant the extension of the automatic stay beyond Defendants Pritchard and APIC to the remaining solvent co-defendants. Although Plaintiff alleges that a contractual agency relationship existed between Defendants, he cites no authority for the proposition that an agency

relationship warrants the extension of an automatic stay. In light of this Court's decision in Patton and Plaintiff's failure to show that unusual circumstances exist to warrant the extension of a stay, we find that Plaintiff's contention is without merit and that the district court properly granted summary judgment to Defendants despite the automatic stay imposed as to Plaintiff's case against Defendants Pritchard and APIC.

CONCLUSION

Inasmuch as Plaintiff has failed to show that his claims have any basis whatsoever in fact or law, we hold that the district court properly concluded that Defendants were entitled to judgment as a matter of law on each of Plaintiff's claims. We further hold that the district court did not err in denying Plaintiff's motion to file a second-amended complaint. Accordingly, this Court **AFFIRMS** the district court's orders granting summary judgment to Defendants and denying Plaintiff's motion to file an amended complaint.

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Northern Dist.
of Ohio
Filed 5/26/99

CHRISTOPHER J. PARRY,
Plaintiff,

CASE NO. 1:98CV179

vs. **JUDGE JOHN M. MANOS**

ARNOLD J. PRITCHARD *et al.,*
Defendants.

MEMORANDUM OF OPINION

On January 27, 1998, Christopher J. Parry, plaintiff, brought suit against numerous defendants arising out of a random drug test he was required to take. On September 25, 1998, he amended the Complaint. The following four Defendants filed motions for summary judgment: (1) Mohawk Motors of Michigan, Inc. ("Mohawk"), (2) Med Express Memphis ("Med Express")[1], (3) Drug Free, Inc.

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[1]Defendant Med Express states its correct corporate name is National Laboratory Center, Inc. Med Express is actually a service mark under which it operates. Because the parties usually refer to this defendant as Med Express, the Court does the same.

("Drug Free"), and (4) Austintown Ambulatory Emergency Room, Inc. ("Austintown").

On March 25, 1999, the Court granted all four motions. On April 13, 1999, the Plaintiff filed a Motion For Reconsideration, to which each of the four Defendants at issue have responded. For the following reasons, the motion is DENIED.

Familiarity with the Court's previous decision is presumed. The Court limits the discussion here to what is necessary to decide the current motion.

I. ANALYSIS

A. Private Cause of Action

In its previous opinion, the Court held there was no legislative intent by Congress to create a private cause of action for violations of federal DOT drug testing regulations. On this basis, the Court granted summary judgment on Counts III, IV, VII (as it relates to the DOT regulations), IX, and X. The Plaintiff seeks reconsideration in view of Hammons v. Norfold Southern Corp., 156 F.3d 701 (6th Cir. 1998).

In Hammons, the Plaintiff, a railroad employee, tested positive for drug use pursuant to a random drug test under federal regulations. A second test was negative, so he was reinstated, but warned that any future positive drug tests would result in dismissal. In the next year and a half, he was given twenty-four "random" drug tests. He then tested positive in final test, resulting in his dismissal. He brought a Bivens action against the railroad company claiming it violated his Fourth Amendment right to be free from unreasonable searches and seizures.

Generally, Bivens actions are actions for damages arising out of a violation of one's federal constitutional rights by another acting under color of federal law. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Hammons, the district court had dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6), holding the Bivens actions can never to maintained against private corporations. The Sixth Circuit reversed, holding that such actions can be maintained against a private corporation if it engages in federal action.

No other issues were addressed. Importantly, the Sixth Circuit generally left open the issue of whether the facts of Hammons could actually support a Bivens action. In addition, the Court made no finding as to whether a corporation engages in federal action by administering a

drug testing program mandated by federal law. Despite the narrow scope of the Sixth Circuit's decision, the Plaintiff seeks to infer a holding that a private cause of action is implied by the federal drug testing scheme.

As set forth in this Court's previous decision, the Supreme Court has established four-factor test to determine whether a private cause of action should be implied from a federal statute. See, e.g., California v. Sierra Club, 451 U.S. 287, 292-97 (1981); Cort v. Ash, 422 U.S. 66, 78 (19875). Applying the appropriate factors, the Court concluded no private cause of action can be implied from the statute governing drug testing for transportation employees. This conclusion was consistent with other courts which have addressed this issue in similar contexts. (See Court's Memorandum of Opinion at 14-17.).

The sole issue in Hammons was the threshold issue of whether a Bivens action could be maintained against a private corporation. Thus, the Sixth Circuit's discussion was too narrow to reach the question a private corporation. Thus, the Sixth Circuit's discussion was too narrow to reach the question raised here. The test of Cort and its progeny was not applied in Hammons, as it had been in the cases relied upon in this Court's previous opinion. This Court, therefore, will not expand the holding of Hammons beyond it narrow limits. Accordingly, the Court stands by its

previous conclusion that no private cause of action can be implied from the DOT drug testing scheme.

Hammons also is factually distinguishable. The Plaintiff there did not allege mere violations of the drug testing regulations for a single test. Rather, the Plaintiff alleged that the twenty-four "random" tests in such a short period of time constitutes an abuse rising to the level of an unreasonable search and seizure in violation of the Fourth Amendment. No such constitutional claim could be made here. Hammons, therefore, does not require reversal of the Court's previous decision.[2]

B. ADA and Public Policy

In Counts V and VI of the Amended Complaint, the Plaintiff alleges violations of the Americans With Disabilities Act ("ADA") against the Defendants he claims were his employers, including Defendant Mohawk. Similarly, in Count VII he alleges (in part) wrongful discharged in violation of public policies embodied in the ADA. The Court granted summary judgment on these

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[2]The Court also notes the Amended Complaint does not properly allege a Bivens action. Indeed, of the counts at issue in this section, only Count IX even mentions "constitutional rights", and does so in the most general sense.

counts in part because the Plaintiff had not exhausted his administrative remedies.

The Plaintiff relies on a "right to sue" letter from the EEOC dated April 21, 1998. The original Complaint, however, was filed on January 17, 1998, before the Plaintiff had the right to sue. Thus, the letter does not confer jurisdiction on the Court. In addition, the letter gave ninety (90) days to file suit. The Amended Complaint was filed on September 25, 1998, beyond the time period prescribed. Thus, neither the original nor Amended Complaints were filed at a time during which this Court could exercise jurisdiction. Accordingly, the Plaintiff did not exhaust administrative remedies.

Even assuming the Plaintiff exhausted administrative remedies, Counts V, VI, and VII do not survive summary judgment. As found by the Court in its previous opinion, even under the most general construction of the Amended Complaint, the evidence does not create a genuine issue of fact. There is no evidence that any of the Defendants ever erroneously perceived him to be a drug abuser (the only disability which could be alleged). Rather, he was disqualified from driving because he left Austintown before giving a second specimen after his first specimen felt "hot".

C. Other Arguments

The Plaintiff's remaining arguments lack merit based upon the Court's previous opinion, and no further discussion is necessary.

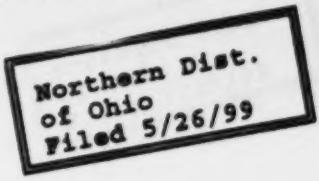
II. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

s/s John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



CHRISTOPHER J. PARRY,
Plaintiff,

CASE NO. 1:98CV179

vs. **JUDGE JOHN M. MANOS**

ARNOLD J. PRITCHARD *et al.,*
Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Plaintiff's Motion For Reconsideration is DENIED.

IT IS SO ORDERED.

s/s John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Northern Dist.
of Ohio
Filed 3/25/99

CHRISTOPHER J. PARRY,
Plaintiff,

CASE NO. 1:98CV179

vs. **JUDGE JOHN M. MANOS**

ARNOLD J. PRITCHARD *et al.,*
Defendants.

MEMORANDUM OF OPINION

On January 27, 1998, Christopher J. Parry, plaintiff, brought suit against numerous defendants arising out a random drug test he was required to take. On September 25, 1998, he amended the Complaint.

Four (4) defendants have filed motions for summary judgment: (1) On April 16, 1998, Defendant Mohawk Motors of Michigan, Inc. ("Mohawk") filed a Motion To Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On August

8, 1998, Mohawk converted its motion to a motion for summary judgment pursuant to Fed. R. Civ. P. 56. See Fed. R. Civ. P. 12(b) (final sentence). (2) On June 4, 1998, Defendant Med Express Memphis ("Med Express") filed its Motion For Summary Judgment.[1] (3) On July 21, 1998, Defendant Drug Free, Inc. ("Drug Free") filed its Motion For Summary Judgment. (4) On July 31, 1998, Defendant Austintown Ambulatory Emergency Room, Inc. ("Austintown") field its Motion For Summary Judgment.

On September 28, 1998, the Plaintiff filed a combined response to the Defendants' motions. Subsequently, the parties filed various replies and sur-replies. Thus, this matter has been fully briefed by the parties.

For the following reasons, the motions for summary judgment are GRANTED.

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[1]Defendant Med Express states its correct corporate name is National Laboratory Center, Inc. Med Express is actually a service mark under which it operates. Because the parties usually refer to this defendant as Med Express, the Court does the same.

I. FACTS

A. The Leased Driver Relationship

Christopher J. Parry, plaintiff, is a truck driver. On July 11, 1996, he signed a contract with Defendant Arnold Pritchard and his company, Defendant A.P.I.C., to drive on their behalf. The contract characterizes the Plaintiff as a "subcontractor". (Parry Dep. at 43, 58-59; Contract of 7/11/96, Ex. B to Mohawk's Motion To Convert).

Pritchard leases trucks and drivers to Defendant Mohawk. Mohawk acts as the carrier and dispatches leased drivers for particular runs. The Plaintiff was one such leased driver. (Parry Dep. at 37-38.) Brian Pawson is an Operations Manager at Mohawk's terminal on Harper Avenue in Detroit, Michigan. Part of his duties include overseeing dispatchers who assign drivers to particular runs. He was overseeing those who dispatched the Plaintiff on the run leading to the events at issue in this case. (Pawson Dep. at 46-56.)

Mohawk determines whether drivers are qualified in conjunction with Central Transport International ("Central Transport"), who acts as a consultant for Mohawk on various safety issues. Larry Cox is a Mohawk recruiter whose job it is to find truck owners and qualify their

drivers. In this regard, Central Transport and Mohawk work closely together. Generally, Central Transport provides safety management consulting services to truck companies, including Mohawk. Mohawk and Central Transport have offices in the same building in Warren, Michigan, and Cox testified he consults with Central Transport personnel on various safety issues (Cox Dep. at 23-28, 35; Fields Dep. at 21-23.)

Generally, Mohawk paid Pritchard for the leased drivers, and Pritchard in turn paid the drivers themselves. Mohawk provided the drivers with gas credit cards and generally advised them on completing runs. There is no evidence, however, of any contractual relationship directly between Mohawk and the Plaintiff. As stated above, drivers (including the Plaintiff) were leased to Mohawk by Pritchard, who in turn had a written contract with the Plaintiff. (Parry Dep. at 253-58; Cox Dep. at 29-34; Pawson Dep. at 27-36.)

As described in detail below, federal law requires commercial motors carries to have a mandatory drug testing program. Thus, to supply drivers to Mohawk, Pritchard signed an agreement under which his drivers would participate in Mohawk's drug testing program. The program actually was administered by Central Transport as

part of its safety consulting services. (Fields Dep. at 21-23; Cox Dep. at 29-34.)

B. Mohawk's Drug Testing Program

49 U.S.C. § 31306 provides that the Secretary of Transportation shall prescribe regulations requiring motor carriers to conduct testing for controlled substance use by operators of commercial motor vehicles. Such testing includes random tests.

The testing procedures are contained in 49 CFR part 40.[2] As an overview, employers must contract with a qualified laboratory to establish procedures, with certain guidelines, for collecting and analyzing urine specimens for evidence of controlled substance use. 49 CFR § 40.23. The employer designates a collection site. 49 CFR § 40.25. After the specimen is collected, it is analyzed by the laboratory. 49 CFR § 40.29. The laboratory results are then reviewed by a Medical Review Officer ("MRO"). The MRO is a licensed physician with sufficient knowledge and training to evaluate the laboratory's results. 49 CFR §§ 40.3 and 40.33.

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[2]49 CFR § 382.165 adopts the procedures set forth in part 40 for drug testing in relation to the operation of commercial motor vehicles.

Randall Fields, an employee of Central Transport, administered Mohawk's drug testing program. He was aided by Linda Campbell, whose title was Substance Abuse Program Administrator. For the random testing portion of the program, a computer program is used to select drivers for testing. Mohawk, through its agents at Central Transport, contracted with Defendant Med Express to act as the laboratory. Defendant Drug Free contracted with Mohawk to act as the MRO. (Fields Dep. at 12-13, 21-23,35,84-85,89; Campbell Dep. at 9-13.)

C. The Plaintiff's Drug Test

On August 6, 1997, the Plaintiff was selected for a random drug test. On that day, Brian Pawson was the Operations Manager for the Mohawk terminal on Harper Avenue in Detroit, Michigan. He was in charge of the dispatchers who dealt with the Plaintiff. The Plaintiff was instructed to proceed to a terminal in Lordstown, Ohio because that location was convenient to his current run. At the Lordstown terminal, he was given a Federal Drug Testing Custody and Control Form ("CCF") and a testing kit.[3] He was then instructed to drive to Defendant

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[3]The CCF consists of seven carbon copies of the original form so that each participant in the test, including the driver, is given a copy.

Austintown, a clinic and emergency room, for collection of his specimen. (White Dep. at 37-42; Pawson Dep. at 50-56; Plaintiff's Response Ex. A.)[4]

Wendy Carter was the Austintown technician who administered the collection. The CCF indicates the collection process began at 12:15 p.m. on August 6, 1997. Initially, Carter checked on the CCF that the temperature of the specimen was "in range". However, she testified at deposition that the Plaintiff's specimen felt "hot". Pursuant to instructions from her supervisor she took the temperature of the Plaintiff and the specimen. Her notes indicate that the Plaintiff's body temperature was 98.2 degrees F. When she took the temperature of the urine specimen, using an ear thermometer, it was 104.6 degrees F. She also used a dipstick to determine that the specific gravity of the specimen was about 1.0, indicating the specimen was too clear for normal urine. (Carter Dep. at 58-69; Plaintiff's Response Exs. A, D, and I.)

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[4]The Plaintiff's response brief asserts there are differences among the testimony of various deponents as to precisely how Parry was notified he had been selected. (See, e.g., Plaintiff's Response Brief at 17.) Such differences, assuming they exist, are not material and thus could not affect a summary judgment ruling.

Even though the specimen temperature did not match the Plaintiff's body temperature, Carter sealed and boxed the specimen for shipping to the laboratory for testing. She testing that her nurses notes (Plaintiff's Response Exs. D and I) were written down after the specimen was boxed. By this time, the Plaintiff had been given his copy of the CCF. In addition, three copies of the CCF were sealed in the box with specimen. Carter altered other copies of the CCF to indicate the specimen was not within the proper temperature range. However, because various carbon pages of the CCF had already been separated, the alteration does not appear on all copies. When asked why she initially indicated a normal temperature on the CCF, she explained she had never encountered an abnormal specimen before, and she assumed the Plaintiff's specimen would be normal as well. (Carter Dep. at 70-72, 96-98; Plaintiff Response Exs. A, D and I.)

After the collection, the Plaintiff was taken to an alcohol technician for an alcohol breath test. Carter testified that she told both the alcohol technician and the Plaintiff that he could not leave because another urine specimen was required in light of the temperature and specific gravity readings. The Plaintiff testified at deposition that he was not specifically told to wait, but instead asked Carter what he should do. He further testified, however, that during these events, "I knew I had

to stay at the facility". After the alcohol test, the Plaintiff was escorted to the waiting area near the reception desk. (Carter Dep. at 72-72; Parry 3/21/98 Dep. at 32,57-58 and 3/20/98 Dep. at 142-43.)

Carter's notes indicate two specimens were taken and the second was observed by a doctor. The notes also indicated the patient left before the second specimen could be taken. Carter explained the discrepancy by stating that the initial statement was written down based on the Plaintiff's agreement to give a second specimen. He left the facility, however, before the second specimen could be taken, which is reflected in the second notation. At around 12:50 p.m., Carter went into the reception area and observed the Plaintiff re-entering Austintown from the outer doors of the emergency room. Thus, she deduced he had left the facility for about ten (10) minutes. She had a conversation with him at the reception area in which she indicated he could not give a second specimen because he had left the facility. There is a corroborating notation in her notes indicating the patient returned at 12:50. The Plaintiff then made a phone call to Defendant Pritchard for instructions, and he spoke to Pritchard's wife. After the call, the Plaintiff told Carter that, pursuant to his employee's (Mrs. Pritchard's) instructions, the first specimen would just have to be sent. The Plaintiff's phone call and Pritchard's instructions also are reflected in the

nurses notes. The Plaintiff then left Austintown. (Carter Dep. at 61, 72-80; Parry 3/20/98 Dep. at 145-47; Plaintiff's Response Exs. D and I.)[5]

At approximately 2:05 p.m., the Plaintiff returned to Austintown again, intending to give a second specimen. Carter instructed him to wait while she determined whether he could. She then contacted Linda Campbell of Central Transport.[6] Campbell told Carter that because the Plaintiff had left the facility, a second specimen could not be taken. Leaving constituted a "refusal to test" under the regulations. Campbell then advised her supervisor, Randall Fields, that there was a problem with the Plaintiff's test. In a

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[5]The Plaintiff accuses Carter of fabricating her notes, and presumes the notes were made hours after the collection. (See Plaintiff's Response Brief at 21-22.) This is an exaggeration. The Plaintiff cites to page 60 of Carter's deposition, but she only testified she wrote the notes after the specimen was boxed, not that she waited hours to draft her notes. The Plaintiff testified the specimens were sealed before he was taken for the breath test. (Parry Dep. at 142-44.) There is no evidence, not even a stated motive, for intentional fabrication. Fabrication is not a reasonable inference to be drawn.

[6]Carter first contacted a person named Joann Miller, who she thought was the contact person for the Plaintiff's drug test. Miller, however, was not the appropriate contact person, and she referred Carter to Linda Campbell.

subsequent conference call between carter and Fields and/or Campbell, Fields or Campbell reiterated that a second specimen could not be taken. They instructed Carter to send the original specimen and explain to the Plaintiff that he should contact Defendant Pritchard for further instructions. Carter did what she was told. (Carter Dep. at 84-87; Campbell Dep. at 24-30; Fields Dep. at 58-60; Plaintiff's Response Ex. I.)[7]

In addition, Brian Pawson, the Mohawk Operations Manager, testified at deposition that he also received a call around lunch time from Austintown (although he could remember the caller's name). He was advised that the

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[7]The Court acknowledges certain discrepancies among the deposition testimony of Carter, Campbell, and Fields regarding these conversations. Carter testified she contacted Campbell and Fields after the Plaintiff returned at 2:05. Campbell, however, testified there were two conversations - one around the time the Plaintiff left the first time after the alcohol test, and a second after he returned at 2:05. Fields testified he acted through Campbell and could not remember speaking directly with anyone at Austintown. The Plaintiff highlights these discrepancies in his Response Brief. The Court, however, finds they are not material. It is undisputed that at some point the Plaintiff left Austintown on either his won accord or under the instruction of Mrs. Pritchard. Fields and/or Campbell advised Carter that leaving precluded taking a second specimen.

Plaintiff had to return to Austintown to give another specimen because the first one was too warm. Within a couple hours, Pawson spoke to the Plaintiff and told him to return to give another specimen. Pawson further told the Plaintiff that he could not be dispatched until another specimen was given. Accordingly, Pawson pulled the Plaintiff's card from the wall of dispatchable drivers. Pawson then contacted Defendant Pritchard and Larry Cox, the Mohawk recruiter, to advise them of the situation. (Pawson Dep. at 61-72; Cox Dep. at 36-40.)[8]

Cox's office is located in the Warren, Michigan building with the Central Transport offices. He went to see Campbell and Fields, who followed up with the clinic. They discussed the fact that the Plaintiff could no longer be dispatched because of what had occurred at the clinic. Fields characterized the Plaintiff as "immediately unqualified" to drive because he had left Austintown. (Fields Dep. at 58-61; Cox Dep. at 40-42.) As stated above, Carter was told by Fields and/or Campbell that the Plaintiff could not give another specimen because he had left the facility. Thus, despite Pawson's instruction to the

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[8]Cox testified he received a call from Brian "Palson". It is clear from the context and other depositions that "Palson" was really Pawson.

Plaintiff to return to Austintown to give a second specimen, it turned out in fact that he could not give one.

Later in the afternoon after the events at Austintown, Defendant Pritchard contacted Fields. Fields informed Pritchard that the Plaintiff was "immediately unqualified" because he had failed to follow instructions at the clinic. In particular, he left the clinic before giving a second specimen. (Fields Dep. at 54-61.)[9]

On August 7, 1997, Defendant Med Express received and tested the Plaintiff's urine specimen for drugs. The specimen also was tested for specific gravity and creatine level. The specimen tested negative for drugs, but had a specific gravity and creatine level below that required by the regulations. This would not mean disqualification,

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[9]In his Response Brief, the Plaintiff states that Fields testified the Plaintiff was "medically disqualified" (citing page 57 of the Fields deposition). He regards this as significant because Linda Campbell characterized the situation as a "refusal to test". (Plaintiff's Response Brief at 13.) The Plaintiff, however, misquotes the transcript. On pages 57-58, Fields testified the Plaintiff was "immediately unqualified", not "medically disqualified", because he left the clinic. Thus, there is no inconsistency between the testimonies of Fields and Campbell. This is also consistent with Cox's testimony that the Plaintiff cannot drive for Mohawk. (Cox Dep. at 47.)

but a driver could be required to give an "observed" specimen (i.e., someone would watch him urinate) in a subsequent test. The results were then reported to Defendant Drug Free, the MRO, for review. They also were sent to Linda Campbell. No one else was given the results at that time. (Rutter Dep. at 12-14,18-19,36-38,45-46;Eades Dep. at 48-49; Plaintiff's Response Ex. D.)

Drug Free received the results on August 7 or 8, 1997. Dr. James Haber, an employee of Drug Free, was the individual physician who acted as the MRO in the Plaintiff's case. He testified at deposition that negative results ordinarily are given an administrative review, essentially meaning the specimen's identification is verified, but little additional testing is done. Negative results also ordinarily are not discussed with the employer. Indeed, Dr. Haber only recalled discussing the Plaintiff's results with David Eades, the president of Drug Free.

Eades, however, testified at deposition that the motor carrier is notified of a low specific gravity or creatine level even if the test results are otherwise negative. This reporting is necessary to permit the employer to require an observed specimen in subsequent tests. Eades also testified that he has discussed negative results with employers when problems with the collection process were brought to his

attention. (Haber Dep. at 25,31,37-39;Eades Dep. at 48-49;78-79.)

Randall Fields and Linda Campbell contacted David Eades (of the MRO) within days of the Plaintiff's test, just after receiving the results from the laboratory. They were concerned with whether it was proper to sent a "hot" specimen out for testing. Eades explained that all specimens, regardless of temperature, must be tested under the federal regulations. They also inquired as to the ramification of the low specific gravity and creatine level. Eades explained that this did not result in disqualification, but the employer had the option to require an observed specimen in subsequent tests. He had his employees look into the matter further, who in turn contacted Austintown and Med Express for their version of the events. Indeed, between August 13-18, 1997, the parties faxed information to each other about the circumstances of the Plaintiff's drug test. (Eades Dep. at 48-49,61,68; Fields Dep. at 64-67; Campbell Dep. at 31-34.)

Carter testified that any subsequent inquiries about the Plaintiff were referred to Randall Fields. Other than such referrals, she did not have any substantive discussions with anyone about the Plaintiff (other than the conversations described above). Fields and Campbell likewise testified that they generally did not talk to others about the Plaintiff.

The Plaintiff no longer drives for Pritchard or Mohawk. When other truck owners and operators made inquiries, Fields and Campbell responded by providing only general information about the Plaintiff, including his employment dates, whether there was a positive result in previous drug tests, and the date of his last test. (Carter Dep. at 89-93; Campbell Dep. at 35-37;43-45; Fields Dep. at 67-71.)

D. Procedural History

On January 27, 1998, the Plaintiff filed his original Complaint, which was amended on September 16, 1998. The amended Complaint contains eleven (11) counts against the various defendants.

Counts I and II allege fraud and breach of an employment contract by Defendant A.P.I.C. These counts are not at issue in any of the current motions.

Counts III through VII are related in that they are asserted against the Plaintiff's purported employers.[10] Count III alleges Defendants Pritchard, A.P.I.C., and Mohawk violated DOT regulations relating to random drug testing promulgated pursuant to 49 U.S.C. § 31306 *et seq.*

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[10]Defendant Mohawk denies its relationship with the Plaintiff was that of employer-employee.

Such violation resulted in the wrongful discharge of the Plaintiff. Count IV seeks punitive damages arising from the conduct set forth in Count III. Count V alleges these Defendants discriminated against the Plaintiff for a perceived disability in violation of the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.* ("ADA"). The "perceived disability" is the Defendants' purported belief that the Plaintiff is a drug addict. Count VI seeks punitive damages arising from the conduct set forth in Count V. Similarly, Count VII alleges these Defendants wrongfully terminated the Plaintiff in contravention of a clear public policy as evidenced by the DOT regulations and the ADA.

Count VIII alleges invasion of privacy against all Defendants. The Defendants allegedly (1) publicized private information about the Plaintiff, and (2) publicized facts which placed him in a false light.

Count IX seeks relief from all Defendants for violation of the DOT regulations. He further alleges the conduct of the Defendants was willful, thereby justifying punitive damages. Count X specifically alleges Defendant Austintown willfully caused the Plaintiff damages by altering the CCF. (Presumably, this relates to Carter's alteration of the temperature indication from normal to high.) Counts IX and X are similar to Counts III and IV in

that all these counts allege violations of the DOT regulations.

Count XI alleges defamation against all Defendants. The Plaintiff further alleges the defamation was done intentionally or with reckless indifference, thereby justifying punitive damages.

On September 9, 1998, counsel for Defendants Pritchard and A.P.I.C., William Fadel of Wuliger, Fadel & Beyer, moved to withdraw. The asserted ground was that Defendants Pritchard and A.P.I.C. filed for bankruptcy (Case No. 98-52756-W). On September 30, 1998, their bankruptcy counsel filed a formal requesting for a stay of proceedings. Neither of these Defendants has filed a motion for summary judgment. Thus, none of the counts as they apply to these Defendants are raised in the current motions.[11]

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[11]Filing the bankruptcy stays actions and claims against the debtor. The stay, however, does not extend to other legal entities, including co-defendants in pending litigation. See, e.g., Patton v. Bearden, 8. F.3d 343, 349 (6th Cir. 1993). Accordingly, it is proper to decide the pending motions because Defendants Pritchard and A.P.I.C., the debtors in bankruptcy, are not adversely affected.

II. LAW AND ANALYSIS

A. Jurisdiction and Venue

The Court has jurisdiction over this action because many of the claims arise under the laws of the United States. See 28 U.S.C. § 1331. The Court has supplemental jurisdiction over the state law claims because they form part of the same case and controversy as the federal claims. See 28 U.S.c. § 1367. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

B. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

C. DOT Regulations

Counts III, IV, VII, IX, and X are similar in that they all arise out of alleged violations of the DOT regulations pertaining to drug testing in the motor carrier industry. The Defendants allege they are entitled to summary judgment because the DOT regulations and underlying statute do not give rise to a private cause of action.

The parties agree that the statute does not explicitly provide for a private cause of action. In Cort v. Ash, 422 U.S. 66, 78 (1975), the Supreme Court established a four-factor test for determining whether such an action can be implied form a statutory scheme. The factors are: (1) whether the Plaintiff is one for whose special benefit the statute was enacted; (2) whether there is an indication of

legislative intent in the statute to provide or deny a private remedy; (3) whether a private remedy is consistent with the underlying legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to imply a cause of action under federal law. See also Thompson v. Thompson, 484 U.S. 174, 179 (1988); Universities Research Association, Inc. v. Coutu, 450 U.S. 754, 770 (1981). The ultimate issue is whether Congress intended to create a private right of action. California v. Sierra Club, 451 U.S. 287, 293 (1981).

The question in the first two factors is not merely who benefits from the legislation, but whether Congress intended to confer federal rights. Sierra Club, 451 U.S. at 494-97. The last two factors are only relevant if the first two factors indicate a congressional intent to create a private remedy. Id. at 498. Thus, it is necessary to review the statute and regulations to determine whether a private remedy can be implied from the drug testing scheme.

49 U.S.C. § 31306(b) provides that the Secretary of Transportation shall prescribe regulations to establish drug testing programs "in the interest of motor vehicle safety". Similarly, the regulations state: "The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of

controlled substances by the drivers of commercial motor vehicles." 49 CFR § 382.101.

Thus, on their face the statute and regulations evidence a primary concern for general public safety on the nation's highways and roads. The scheme is not specifically intended for the protection of truck drivers like the Plaintiff. Nothing in the legislative history indicates the contrary. Accordingly, under the plain reading of the statute and regulations, the first two factors of the Cort analysis weigh against a private cause of action.

The Defendants principally rely on Salomon v. Roche Compuchem Laboratories, Inc., 909 F. Supp. 126 (E.D.N.Y. 1995). There, the plaintiff was a flight attendant for American Airlines. She brought suit alleging the defendant violated 49 CFR § 40.37, the regulation governing employee access to drug testing records. As with commercial motors vehicles, 49 CFR part 40 contains the procedures for drug testing airline employees. The Court concluded the statute was framed as a general mandate to the Federal Aviation Administration ("FAA") to establish drug testing regulations, and was not created for a specific class of persons. Id. at 128.

Although not binding on this Court, the Court finds the analysis of Salomon persuasive. Here too, the statute is

framed as a general mandate to the Secretary of Transportation. The FAA and DOT even use the same regulations for drug testing procedures. The Plaintiff argues Salomon should not control because that case involved the FAA. This distinction, however, is insignificant. The Plaintiff also argues Salomon's holding is limited to 49 CFR § 40.37. The plain language of the case, however, broadly refers to the statutory framework and is not limited to any specific regulation.

Other case law supports the Defendants' position. A general prohibition or command to a federal agency does not create a private cause of action. Coutu, 450 U.S. at 772. Likewise, federal regulations themselves cannot create a private cause of action unless such action is at least implied from the applicable statute. Smith v. Dearborn Financial Services, Inc., 982 F.2d 976, 979 (6th Cir. 1993). Like Salomon, other Courts have held that the analogous FAA drug testing scheme does not create a private cause of action. See, e.g., Schmeling v. Nordam, 97 F.3d 1336, 1343-44 (10th Cir. 1996); Drake v. Delta Airlines, Inc., 923 F. Supp. 387, 389-92 (E.D.N.Y. 1996), aff'd in relevant part, 147 F.3d 169, 170-71 (2d Cir. 1998). Likewise, the Federal Railroad Administration ("FRA") tests its employees using the procedures of 49 CFR part 40. Railroad employees also do not have a private cause of action under this drug testing scheme. Abate v. Southern

Pacific Transportation Co., 928 F.2d 167, 169-70 (5th Cir. 1991). There is no basis to hold differently for drivers of commercial motor vehicles.

The Plaintiff seeks to infer a cause of action from various provisions of the statute and regulations. First, he relies on 49 U.S.C. § 31306(c)(7) requiring that the regulations provide for confidentiality. Requirements concerning record keeping and confidentiality are embodied in the regulations. Such concerns, however, have been held not to imply a private cause of action for their violation. See Schmeling, 97 F.3d at 1344; Ellison v. Cocke County, 63 F.3d 467, 470-71 (6th Cir. 1995); Salomon, 909 F. Supp. at 128. The Plaintiff also relies on the provisions stating that employers and drivers who violate the regulations can be subject to civil and criminal penalties. See 49 CFR §§ 382.507 and 390.37. Such penalty provisions, however, do not create any additional private remedies. See Abate, 928 F.2d at 170 (enforcement scheme does not support inference of private action).

He also relies on 49 CFR § 40.25(f)(22)(ii), which states an employee cannot be forced to waive negligence liability. As stated above, a regulation cannot create a private cause of action if not supported by the statute. The statute does not support the Plaintiff's position. In addition, even assuming the ability to sue for negligence, that is not

the same as suing directly for a violation of a DOT regulation.[12]

Finally, the Plaintiff relies on 49 U.S.C. § 14704(a)(2), and (c)(1). These provisions essentially provide for damages against carriers for violating tariff and registration requirements. This section has nothing to do with section 31306 and drug testing programs.

In Count VII, the Plaintiff alleges wrongful termination by Defendant Mohawk under Ohio law in contravention of a clear public policy embodied in the DOT regulations. To establish wrongful discharge under Ohio law, the public policy must be clearly stated, and the discharge must be for a reason prohibited by statute. Greenley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St. 3d 228, 233-34 (1990); Kulch v. Structural Fibers, Inc., 78 Ohio St. 3d 144, 149-51 (1997). The only policy stated in the DOT drug testing scheme is the concern abut general public safety. As stated above, Courts have concluded there was no intent of Congress to create a private cause of action from drug testing schemes. The Plaintiff cannot avoid the legislative intent by rephrasing his

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[12]The Court also notes that none of the Counts in the amended Complaint assert negligence.e

cause of action as one for wrongful discharge against public policy.

The Court concludes there is no legislative intent to create a private cause of action for violations of DOT drug testing regulations under the first two Cort factors. Thus, there is no need to consider the third and fourth factors. See Sierra Club, supra. There also is no need, therefore, to determine whether any regulations were in fact violated, which the parties dispute. Thus, any such disputes are not material. Accordingly, the Defendants are entitled to summary judgment as to Counts III, IV, VII (as it relates to DOT regulations), IX, and X.

D. ADA and Public Policy

Defendant Mohawk seeks summary judgment on Counts V and VI which assert violations of the ADA. It also seeks summary judgment on Count VII for wrongful discharge in contravention of the public policy embodied in the ADA. (These counts are not asserted against Defendants Austintown, Med Express, and Drug Free because these entities admittedly are not employers.) The Plaintiff alleges he was discharged for the perceived disability of being a drug addict.

As a threshold matter, a Plaintiff seeking to recover under the ADA must exhaust administrative remedies. Particularly, a charge must first be filed with the Equal Employment Opportunity Commission ("EEOC".) Haithcock v. Frank, 958 F.2d 671, 675 (6th Cir. 1992); Khader v. Aspin, 1 F.3d 968, 971 (10th Cir. 1993). There is no evidence that the Plaintiff ever filed a charge with the EEOC. Accordingly, Mohawk is entitled to summary judgment on Counts V and VI.

As to Count VII, the Plaintiff cannot avoid the exhaustion requirement by framing his claim as one for discharge in contravention of public policy. To permit him to do so would emasculate the well-established exhaustion requirement.

Furthermore, the Court concludes the disqualification of the Plaintiff did not contravene any purported public policy embodied in the ADA as a matter of law. Although drug addiction is considered a disability, a current illegal drug user is not considered qualified for employment. Even those in rehabilitation must no longer be users to qualify. An exception is made for those erroneously regarded as users. 42 U.S.C. §§ 12114(a) and (b); Shafer v. Preston Medical Hospital Corp., 107 F.3d 274, 276 (4th Cir. 1997). In his Complaint, the Plaintiff never addresses the fact that current drug use is excluded by the ADA.

Under the broadest construction of the Plaintiff's pleadings, he could be deemed to have invoked the exception for erroneous charges of drug use as embodying the underlying policy on which he relies. Even under this generous construction, he cannot point to any evidence establishing a genuine issue of material fact. Fields, Campbell, and Cox all testified the Plaintiff was disqualified when he left the clinic without giving a second specimen. This occurred before any test results were done by the laboratory. Carter testified she determined the specimen was outside the necessary temperature range. This is grounds to believe the specimen has been altered. 49 CFR § 40.25 e(2)(i)(B) and (f)(13). If alteration is suspected, a second specimen must be taken as soon as practicable. 49 CFR § 40.25(f)(16). The collection procedure is over when the employee leaves the collection site. 49 CFR § 40.25(f)(d). The Plaintiff testified he knew he had to stay, but he left anyway before giving the second specimen. The Plaintiff cannot point to a single piece of evidence to show that the Defendants ever perceived him to be a drug user. Their actions were entirely consistent with DOT regulations regarding a "hot" specimen. Thus, there can be no contravention of any purported ADA policy against erroneous charges of drug use.

In summary, the Plaintiff has not exhausted administrative remedies with respect to his ADA claims,

and cannot rescue them by invoking public policies underlying the ADA. Accordingly, Defendant Mohawk is entitled to summary judgment on Counts V, VI, and VII (as it relates to the ADA).[13]

E. Defamation

Count XI alleges defamation against all Defendants under Ohio law. Defamation is a false publication causing injury to a person's reputation, including affecting him adversely in a trade or business. Snyder v. AG Trucking, Inc., 57 F.3d 484, 489 (6th Cir. 1995). The elements of defamation are (1) a false and defamatory statement, (2) unprivileged publication to a third party, (3) a requisite amount of fault on the part of the publisher, and (4) actionability or special harm caused by the statement. Id., citing, Hahn v. Kotten, 43 Ohio St. 2d 237, 331 (1975); Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Services, Inc., 611 N.E.2d 955, 962 (Ohio App. 1992); National Medic Services Corp v. E.W. Scripps Co., 573 N.E.2d 1148, 1149-50 (Ohio App. 1989).

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[13]Because of these conclusions, the Court need not decide the issue of whether Mohawk was the Plaintiff's "employer" under the ADA or DOT regulations.

Falsity is an essential element of defamation, so a true statement cannot be the basis for such a claim. Bruss v. Vindicator Printing Co., 672 N.E. 2d 238, 240 (Ohio app. 1996); National Medic, 573 N.E. 2d at 1150. The Defendants first argue they are entitled to summary judgment because no false statements were made about the Plaintiff.

The Plaintiff alleges Defendant Mohawk defamed the Plaintiff when Fields stated the Plaintiff was immediately unqualified because he did not follow instructions at the clinic. Similarly, Campbell told others the Plaintiff was disqualified for refusing to test. (Plaintiff's Response Brief at 57.) Neither of these statement is false. The Plaintiff testified that he knew he had to stay at the clinic to give a second specimen because the first one was outside the necessary temperature range. Indeed, the regulations require a second specimen. He left before giving one. Whether the consequence of his leaving is described as "immediately unqualified" or a "refusal to test" is irrelevant. It is enough to defeat the falsity element to show that the "gist" of the statement is true or substantially true. Bruss, 672 N.E. 2d at 240; National Medic, 573 N.E. 2d at 1150. Here, there is no doubt in the evidence that the Plaintiff could not drive for Mohawk because he left the clinic without giving a second specimen.

The statements by prospective employers support this. (See Plaintiff's Response Exs. O through T.) They essentially state they could not hire the Plaintiff because of problems with his drug test. This was correct. None of them, however, state that anyone said the Plaintiff tested positive for drugs or otherwise made a false statement about the Plaintiff's drug test.

The Plaintiff further alleges Mohawk defamed him when Pawson pulled his card from the bulletin board identifying dispatchable drivers. (Plaintiff's Response Brief at 58.) In truth, the Plaintiff was not dispatchable. There also is no allegation that Pawson ever made statements to the effect that the Plaintiff had used drugs. The mere act of pulling his card was not a "false statement".

With respect to Defendant Drug Free, the Plaintiff alleges he was defamed when Eades instructed his employees to investigate the low specific gravity and creatine level. He states: "Eades had to provide Parry's written name, social security number, accession number to Parry's specimen and the fact that the results were negative with low gravity and creatine levels." (Plaintiff's Response Brief at 58.) Even assuming it was improper for Eades to order an investigation and share such information, none of it was false. Absent evidence of a false statement, there is no claim for defamation.

Similarly, the Plaintiff alleges Med Express defamed him by responding to the inquiries of Eades' employees. Med Express also talked with certain prospective employers. (See Plaintiff's Response Brief at 58.) As stated above, however, the Plaintiff cannot point to any false statements even assuming information about the Plaintiff was improperly shared. The same analysis and conclusion applies with respect to Defendant Austintown. (See Plaintiff's Response Brief at 59.)

In short, the substance of the Plaintiff's defamation claim is that the Defendants shared information which they should have kept confidential. Even if true, this does not establish a prima facie case of defamation. There must be a false statement. The Plaintiff, however, cannot point to any false statements made by the Defendants regarding the Plaintiff's drug test.

Assuming the Plaintiff could meet the falsity requirement, the Defendants still are entitled to summary judgment under the doctrine of qualified privilege. "A publication is privileged when it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, . . . in matters where his interest is concerned." A & B - Abell Elevator Co., Inc. v. Columbus/Central Ohio Building & Construction Trades Council, 73 Ohio St. 3d 1, 8 (1995), quoting, Hahn, 43

Ohio St. 2d at 244. The essential elements of the privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in scope to this purpose, (4) a proper occasion, and (5) a publication in a proper manner and to proper parties only. Id.; see also Smith v. Papp, 683 N.E. 2d 384, 389 (Ohio App. 1996); Kremer v. Cox, 682 N.E. 2d 1006, 1020 (Ohio App. 1996); Burkes v. Stidham, 668 N.E. 2d 982, 987-88 (Ohio App. 1995). Whether a qualified privilege exists is a question of law for the Court. A & B, 73 Ohio St. 3d at 7.

Once a qualified privilege is established, the Plaintiff can only recover by providing by clear and convincing that the allegedly false statements were made with actual malice. "Actual malice" is defined as acting with knowledge that the statements are false or with reckless disregard as to their truth or falsity. Jacobs v. Frank, 60 Ohio St. 3d 111, 115-16 (1991); see also A & B, 73 Ohio St. 3d at 11-12; Burkes, 668 N.E. 2d at 988.

Employees of these Defendants clearly shared information with each other concerning the Plaintiff's drug test. There is no evidence, however, that such sharing was beyond that necessary to collect and analyze the Plaintiff's specimen. In particular, as stated above, Eades testified that he had discussed even negative results with employers when problems had arisen in the collection process. Thus, it was

appropriate for Mohawk to seek his advice, and for Eades to respond. The evidence similarly is that Med Express provided the results to Mohawk and Drug Free, which was proper given the suspicious nature of the test. As to outsiders, Carter testified that all inquiries about the Plaintiff were referred to Fields. Fields and Campbell stated the information given to prospective employers was limited. There is no evidence to the contrary.

The affidavits of the prospective employers are consistent with this conclusion. Brian Easton was told little more than that the Plaintiff had refused to test. (Plaintiff's Response Ex. O.) Gary Green received most of his information from the Plaintiff himself, and was only told by the Defendants of the refusal to test after an inquiry was made at the Plaintiff's behest. (Plaintiff's Response Ex. R.) The affidavits of Rick Craig and Joy Guffey, who work with Green, do not mention any conversation they had personally with any of the Defendants. (Plaintiff's Response Exs. S and T.) Indeed, the attachment to Guffey's affidavit indicates she contacted Drug Free twice but got no response.

The Court finds no genuine issue of fact with respect to the existence of a qualified privilege. The Defendants' statements were all made with the goal toward effecting the DOT regulations. The evidence is that all discussions, even

those with prospective employers, were had with proper parties and were limited in scope. The disclosure of drug test results to protect personal and business interests falls within the privilege. Willis v. Roche Biomedical Laboratories, Inc., 61 F.3d 313, 316-17 (5th Cir. 1995). Likewise, statements made in good faith in the employment context are with the privilege. Lyons v. Farmers Insurance Group of Companies, 587 N.E. 2d 362, 365-66 (Ohio App. 1990) (affirming summary judgment in a case involving disclosure of drug test results to prospective employers); Smith v. Klein, 492 N.E. 2d 852, 856 (Ohio App. 1985).

Because the privilege applies, to recover the Plaintiff must prove actual malice by clear and convincing evidence. There is no evidence that any of these Defendants acted with knowledge that a statement was false or with reckless disregard to truth or falsity. To the contrary, the evidence shows the Defendants were meticulous in their handling of this matter. Carter sought the advice of her supervisor, as did Campbell. Cox, Fields, and Campbell conferred together to ensure their actions were proper under the regulations. Subsequently, they sought confirmation of this from Eades. Eades followed up on their inquiries, as he had done with previous clients who had encountered collection irregularities. Thus, there was no malice.

The Court has reviewed the facts on which the Plaintiff bases its claim of actual malice, and finds they do not raise any genuine issue for trial. The Plaintiff essentially repeats the same facts upon which he relies to show falsity. Actual malice, however, goes beyond mere falsity, and often includes some evidence of ill will, spite, grudge, or ulterior purpose behind the statements. Lyons, 587 N.E. 2d at 366, citing, Hahn, 43 Ohio St. 2d at 248. The Plaintiff cannot point to evidence which is sufficient to avoid summary judgment.

Accordingly, these Defendants are entitled to summary judgment on Count XI.

F. Invasion of Privacy

The final count at issue in the current motions is Count VIII, which was added by the Amended Complaint. Count VIII alleges invasion of privacy against all Defendants. The Plaintiff alleges the Defendants invaded his privacy when they "publicized private information about the Plaintiff", and "publicized such facts which placed him in a false light".

Invasion of privacy actually consists of four separate torts: (1) intrusion into the Plaintiff's seclusion, solitude, or private affairs; (2) public disclosure of embarrassing private

facts; (3) publicity that places the Plaintiff in a false light; and (4) the appropriation of the Plaintiff's name and likeness to the Defendant's advantage. Piro v. Franklin Township, 656 N.E. 2d 1035, 1044 (Ohio App. 1995); Strutner v. Dispatch Printing Co., 442 N.E. 2d 129, 133-34 (Ohio App. 1982). The Plaintiff alleges the second and third categories.

The Plaintiff alleges the Defendants publicized facts which placed him in a false light. Ohio law, however, does not recognize the "false light" type of invasion of privacy. M.J. DiCorpo, Inc. v. Sweeney, 69 Ohio St. 3d 497, 507 (1994); Kilcoyne v. Plain Dealer Publishing Co., 112 Ohio App. 3d 229, 238-39 (1996); Angelotta v. American Broadcasting Corp., 820 F.2d 806, 808 (6th Cir. 1987). The Plaintiff, therefore, cannot recover on this ground.

The Plaintiff also alleges the Defendants publicized embarrassing private information about him. The publicity must involve a private matter about which the public has no legitimate concern, and be to so many persons such that the matter is substantially regarded as one of public knowledge. Seta v. Reading Rock, Inc., 654 N.E. 2d 1061, 1067-68 (Ohio App. 1995).

In contrast to defamation, there is no falsity requirement for this type of invasion of privacy. However,

the doctrine of qualified privilege applies here as well. Knecht v. Vandalia Medical Center, Inc., 470 N.E. 2d 230, 232 (Ohio App. 1984), citing, Hahn v. Kotten, 43 Ohio St. 2d 237 (1975). for the reasons given in the discussion of the defamation claim, the Defendants' statements were privileged.

Accordingly, the Defendants are entitled to summary judgment on Count VIII.

III. CONCLUSION

For the foregoing reasons, the Motions For Summary Judgement of Defendants Mohawk, Med Express, Drug Free, and Austintown are GRANTED. Accordingly, as to these Defendants, the case is dismissed with prejudice, each party to bear its own costs.

Defendants Pritchard and A.P.I.C., the only remaining Defendants, have filed for bankruptcy. Accordingly, this case is stayed as to them pursuant to the automatic stay provisions of the Bankruptcy Code. In view of the bankruptcy, the motion of William Fadel to withdraw as counsel is GRANTED.

IT IS SO ORDERED.

s/s John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Northern Dist.
of Ohio
Filed 3/25/99

CHRISTOPHER J. PARRY,
Plaintiff,

CASE NO. 1:98CV179

vs. **JUDGE JOHN M. MANOS**

ARNOLD J. PRITCHARD *et al.,*
Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Motions For Summary Judgment of Defendants Mohawk Motors of Michigan, Inc., Med Express Memphis (a.k.a. National Laboratory Center, Inc.), Drug Free, inc. and Austintown Ambulatory Emergency Room, Inc. are GRANTED. Accordingly, as to these Defendants, the case is dismissed with prejudice, each party to bear its own costs.

Defendants Arnold J. Pritchard and A.P.I.C., the only remaining Defendants, have filed for bankruptcy. Accordingly, this case is stayed as to them pursuant to the automatic stay provisions of the Bankruptcy Code. In view of the bankruptcy, the motion of William Fadel to withdraw as counsel (Docket No. 83) is GRANTED.

IT IS SO ORDERED.

s/s John M. Manos
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED

JUN 1 2001

OFFICE OF THE CLERK

No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC.: AUSTINTOWN AMBULATORY ER; MEDEXPRESS; AND DRUG FREE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOHAWK MOTORS OF MICHIGAN, INC'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURA JULIUS AVERY
Counsel of Record
ERIN STOTTLEMYER GOLD
REMINGER & REMINGER CO., L.P.A.
113 St. Clair Avenue, Suite 700
Cleveland, Ohio 44114-1273
(216) 687-1311
lavery@reminger.com

Attorneys for Respondent Mohawk Motors of Michigan, Inc.

Balmar Legal Publishing Services, Washington, DC 202-682-9800

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QUESTIONS PRESENTED FOR REVIEW

Whether Congress intended the Federal Motor Carrier Safety Regulations to provide a private right of action to commercial truck drivers who allege violations of the drug testing collection procedures after being disqualified for submitting a suspect urine sample and where the regulations themselves do not contemplate an express or implied remedy.

Whether a commercial truck driver properly selected for a random drug screen pursuant to the Federal Motor Carrier Safety Regulations fails to allege a *Bivens* claim for violations of his constitutional right to be free from unreasonable governmental searches and seizures where the claim is not timely asserted, no federal action is alleged, the alleged deviations from the collection procedures do not amount to constitutional violations, and the driver's own conduct affects his substantial interest in his continued employment.

STATEMENT PURSUANT TO RULE 29.6

Respondent Mohawk Motors of Michigan, Inc. is not a subsidiary or affiliate of a publicly owned corporation.

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STATEMENT OF JURISDICTION

This case fails to invoke an important question of federal law under 28 U.S.C. § 1254(1), as the federal courts uniformly hold that no private right of action exists under the Federal Motor Carrier Safety Regulations for drivers who allege violations of the drug testing procedures. Therefore, this Court does not have jurisdiction to review the matters presented in the Petition.

STATEMENT OF THE CASE

This case arises from events on August 6, 1997 when Mohawk Motors randomly selected Petitioner for drug and alcohol testing. Petitioner's original Complaint included 11 causes of action, including claims for breach of employment contract, wrongful discharge, discrimination in violation of the Americans with Disabilities Act, and various violations of the federal Department of Transportation ("D.O.T.") regulations relating to random drug testing promulgated under the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"), codified as it relates to commercial motor carriers at 49 U.S.C. § 31306 *et seq.*

Pursuant to federal mandate, Respondent Mohawk Motors of Michigan, Inc. maintains a drug-testing program for its drivers. Petitioner, a driver employed by Arnold J. Pritchard and his company A.P.I.C., was leased to Mohawk Motors. When Petitioner was randomly selected and appeared at the collection site for the drug screen on August 6, 1997, he submitted a urine specimen that felt unusually warm to the collector. The specimen was recorded at a higher temperature than Petitioner's body temperature. A specimen temperature outside a certain range constitutes a reason to believe that a specimen has been altered or substituted. 49 C.F.R. § 40.25(f)(13). Pursuant to D.O.T. regulations, whenever a person collecting the specimen has reason to believe that an individual has altered or substituted a specimen, a second specimen must be obtained as soon as

possible under direct observation at the collection site. 49 C.F.R. § 40.25(f)(16).

Petitioner admits that he was told he needed to stay at the testing facility to provide a second sample and that he knew he could not leave. Despite this knowledge, Petitioner left the testing facility and then later returned in an attempt to submit a second sample. Petitioner's leaving the test facility before the second specimen could be collected is considered a "refusal to test," which ended the test per D.O.T. regulations. 49 C.F.R. § 40.25. Specifically, the recently revised regulations provide that "[a]s an employee, you have refused to take a drug test if you: . . . [2] fail to remain at the testing site until the testing process is complete." 49 C.F.R. § 40.191(a) (Effective August 1, 2001). The regulations further state that "[a]s an employee, if you refuse to take a drug test, you incur the consequences specified under D.O.T. agency regulations for a violation of those D.O.T. regulations." 49 C.F.R. § 40.191(c) (Effective August 1, 2001). An employer is required to remove a driver from safety sensitive positions when there is a refusal to test. Thus, on August 6, 1997, Mohawk Motors' actions in stating that Petitioner could not immediately drive on its behalf were consistent with the regulatory scheme. Petitioner then took it upon himself to take his employer's tractor-trailer across state lines, which prompted the owner to initiate criminal proceedings against him and terminate Petitioner's employment.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS PROPERLY APPLIED THE TEST FOR AN IMPLIED PRIVATE RIGHT OF ACTION FOR VIOLATIONS UNDER THE FEDERAL MOTOR CARRIER SAFETY REGULATIONS AND, THEREFORE, DRIVERS SUBJECT TO RANDOM DRUG TESTING DO NOT HAVE AN INDEPENDENT CAUSE OF ACTION.

This Court established a four-prong test for determining whether a private cause of action can be implied from a statutory scheme in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080 (1975). The factors include (1) whether the plaintiff is one for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent in the statute to provide or deny a private remedy; (3) whether a private remedy is consistent with the underlying legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law. *See also Thompson v. Thompson*, 484 U.S. 174, 179, 108 S.Ct. 513 (1988); *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 770, 101 S.Ct. 1451 (1981). Although this Court has modified somewhat the factors taken into account in determining whether a private right of action can be implied from a regulatory scheme, the ultimate issue to be determined is whether Congress intended to create a private right of action. *California v. Sierra Club*, 451 U.S. 287, 293, 101 S.Ct. 1775 (1981).

In determining whether a private remedy exists, although the *Cort* test is relevant, each prong of the four-factor test is not entitled to equal weight. *Transamerica Mortgage Advisors, Inc v. Lewis*, 44 U.S. 11, 23-24, 100 S.Ct. 242 (1979), *quoting Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479 (1979). The first two factors of the *Cort* test look not only at who benefits from the

legislation, but whether Congress intended to confer federal rights. *Sierra Club*, 451 U.S. at 294-97. The remaining two factors only become relevant if the first two factors indicate a Congressional intent to create a private remedy. *Id.*

The statute through which Petitioner seeks to imply a private right of action, 49 U.S.C. § 31306, provides that the Secretary of Transportation shall prescribe regulations requiring motor carriers to conduct testing for controlled substance use by operators of commercial motor vehicles. The D.O.T., in 49 C.F.R. § 40, describes required procedures for conducting workplace drug and alcohol testing for the federally regulated transportation industry, including commercial motor carriers. The Federal Motor Carrier Safety Administration ("FMCSA") provides drug and alcohol testing requirements for carriers and commercial driver's license holders. *See* 49 C.F.R. § 382. The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles. 49 C.F.R. § 382.101.

The statute and regulations governing drug and alcohol testing of employees placed in safety sensitive positions, such as tractor-trailer operators, do not explicitly provide for a private cause of action. Therefore, Petitioner must look to the legislative scheme to determine whether a private right of action exists by implication. The courts below correctly held that it does not.

In analyzing whether Congress intended to confer federal rights upon Petitioner and drivers generally, it is important to note that while it is possible for Petitioner to benefit from the statute and regulations, the analysis does not end with the fact that Petitioner may have been an intended beneficiary. Petitioner must also establish that Congress intended to confer federal rights upon him and other individual commercial drivers placed in safety-sensitive positions. Where a statute does no more than state a general prescription of conduct, it implies no private remedy. *Sierra Club*, 451 U.S. at 294;

Universities Research, 450 U.S. at 772. Further, this Court previously has construed Congressional silence concerning remedies as indicative that Congress was not concerned with private rights. *Id.*

In this case, 49 U.S.C. § 31306 is framed as a general mandate to the Secretary of Transportation to establish drug-testing programs for operators of commercial motor vehicles. Therefore, the statute, which is nothing more than a general prescription of conduct, implies no private right of action. Equally significant, in addition to the courts below in this case, the federal courts uniformly hold that this specific regulatory scheme as contemplated by Congress does not demonstrate a concern for the protection of drivers who believe they have been aggrieved through the drug testing process. *See, e.g., Salomon v. Roche Compuchem Laboratories, Inc.*, 909 F.Supp.126 (E.D.N.Y. 1995) (concluding that 49 C.F.R. § 40 was framed as a general mandate to establish drug testing regulations and was not created for a specific class of persons); *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 170-71 (2d Cir. 1998) (finding no private cause of action of 49 C.F.R. § 40); *Hall v. United Labs, Inc.*, 31 F.Supp.2d 1039 (N.D. Ohio 1998) (finding there is no evidence that Congress contemplated individual enforcement actions under 49 C.F.R. § 40.33 and declining to fashion a new remedy for the enforcement of drug testing regulations); *Schmeling v. NORDAM*, 97 F.3d 1336, 1343-44 (10th Cir. 1996) (concluding that 49 C.F.R. § 40.35 does not provide for a private cause of action); *Abate v. S. Pacific Transp. Co.*, 928 F.2d 167 (5th Cir. 1991) (concluding that Federal Railroad Safety Act provides no private cause of action to enforce regulations implementing federally mandated drug-testing programs set forth in 49 C.F.R. § 40).

Petitioner's reliance on *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000), which involves a statutory scheme governing the FDIC to ensure the maintenance of failed banks, is misguided. In that case, shareholders challenged portions of the statute that required

accounting and record keeping where they were not provided with relevant reports. The Ninth Circuit Court of Appeals reasoned that, because bank shareholders were entitled to receive certain reports mandated under the statute, they were intended beneficiaries and thus entitled to a private right of action. Petitioner stretches this holding to imply that because the D.O.T. regulations in this instance require reporting of test results to both employers and those being tested, so too a private right of action must exist, *for any reason*, under the regulations. Petitioner's arguments to this Court, however, do not contemplate a violation of a reporting provision, but the procedures adhered to prior to the resulting report.

Looking to the intent of Congress in enacting FOTETA, there appears no similar indication of intent to create a remedy for Petitioner. Rather, the intent is to bestow upon the D.O.T. the authority to impose regulations that ensure the "physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely." 49 U.S.C. § 31136(a)(3). Moreover, the D.O.T. expressly provides for the enforcement of the drug testing regulations through an administrative remedy. *See* Enforcement Considerations, 54 Fed. Reg. 230 at 49,854 (Dec. 1, 1989). Further, 49 C.F.R. § 386 establishes procedures to monitor violations or failure to comply with the provisions of the statute and regulations. 49 C.F.R. § 386.1. The regulations go no further than to demonstrate an intention by Congress to monitor alleged violations thereunder. Indeed, the extensive enforcement and investigative mechanisms are a strong indication that Congress did not envision a private right of action for Petitioner or those drivers similarly situated. Further evidencing the lack of Congressional intent, when the regulations were recently revised with an effective date of August 1, 2001, there was no mention of an intent to create a cause of action. Instead, the revised rules make clearer the mechanisms available for noncompliance with the testing regulations. Department of Transportation, Office of the Secretary, 49 C.F.R. § 40, Docket OST-99-6678.

Accordingly, the uniformity of the lower courts on this issue and the sound reasoning consistently applied throughout the federal courts in arriving at the conclusion that no private right of action exists under the D.O.T. guidelines obliges this Court to decline discretionary review over this matter.

II.

PETITIONER FAILED TO ALLEGE AND CAN NOT DEMONSTRATE A *BIVENS* CLAIM FOR VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Petitioner's contention that he sufficiently alleged constitutional violations derive from the District Court's refusal to grant him leave to amend the First Amended Complaint to allege constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, (1971). (A-1). The substantive flaws notwithstanding, Petitioner's constitutional arguments are fraught with procedural shortcomings that diminish the value of further appellate review. Indeed, Petitioner fails to point out that in his brief before Sixth Circuit Court of Appeals, he conceded that he did not properly allege a "*Bivens* action." Moreover, Petitioner did not request leave to amend until nine months after filing the First Amended Complaint, one year after filing his initial Complaint, and two and one-half months after the District Court granted summary judgment to the Respondents and denied Petitioner's motion for reconsideration.

Now, Petitioner contends that his First Amended Complaint sufficiently set forth allegations of constitutional violations and thus a *Bivens* action. Regardless, the District Court and the Sixth Circuit Court of Appeals correctly held that granting Petitioner leave to amend the Complaint was untimely, prejudicial, and futile. A *Bivens* claim is one for damages arising out of the violation of one's constitutional rights due to another's conduct under color of federal law. As acknowledged by the Court of Appeals below, a *Bivens* action

may arise against a private corporation under certain circumstances. *See Hammons v. Norfolk S. Corp.*, 156 F.3d 701, 704 (6th Cir. 1998). Petitioner never alleged or attempted to demonstrate that the Respondents engaged in federal action. Instead, he relied exclusively on the D.O.T. guidelines as implying a private right of action for violations thereunder.

Moreover, even assuming a *Bivens* action was properly alleged, Petitioner is unable to demonstrate a violation of his constitutional rights. Petitioner argues that the random test and request for a second test were unreasonable searches and seizures under the Fourth Amendment. He does not argue that the procedure for selecting his name for testing was randomly administered or unreasonable, thus distinguishing Petitioner's reliance on *Drake v. Delta Airlines, Inc.*, 147 F.3d 169 (2nd Cir. 1998). Petitioner concentrates instead on the perceived flaws in the collection and testing procedures, which do not give rise to a claim for constitutional violations under *Bivens*.

Indeed, the procedures promulgated by the D.O.T. are designed to ensure accuracy of the test result. Petitioner, however, produced no facts demonstrating that the testing mechanisms identified, such as the time delay in taking the specimen's temperature, altered custody forms, unattended specimen, use of the ear thermometer, or the manual specific gravity test, compromised the integrity of the sample or inappropriately affected the specimen collector's observations. He further produced no facts demonstrating that the specimen ultimately tested was adulterated by the testing process or that the result was inaccurate. To the contrary, Petitioner's test results were negative for drug use. Further, the specific gravity as initially measured by hand at the testing facility was confirmed by the testing laboratory, strongly suggesting that the specimen provided could not have been urine. Petitioner does not challenge the ultimate results of the test. In whole or in part, Petitioner did not demonstrate that any of the collection procedures exceeded the scope of the "search" or diminished confidence in the reliability of the

results. Therefore, he can not demonstrate that the procedures used to collect and test the first sample were unreasonable.

Petitioner's argument that the request for the second test was more unreasonable is derivative of the procedures utilized in the collection of the first sample. He does not challenge the demand as lacking reasonable suspicion or randomness. A mere request for a second test during the collection process does not rise to the level of an unreasonable search and seizure, particularly where the D.O.T. regulations require a second test under circumstances suggesting an altered or substituted specimen. *See* 49 C.F.R. § 40.25. Moreover, even assuming that the first sample was collected in violation of the D.O.T. regulations, those regulations do not necessarily establish the constitutional boundaries of reasonableness. To the contrary, the regulations attempt to ensure optimal reliability of the results. The reliability of both samples thus was elevated by requiring Petitioner to remain on the premises so as to ensure that the second specimen was close in time and of comparable quality to the first.

Equally fatal to the significance of further review of Petitioner's constitutional allegations is the lack of a relationship between the alleged unreasonableness of the search to Petitioner's continued employment, the substantial interest alleged to be at issue. Although he continues to maintain otherwise, Petitioner admitted under oath that he knew he had to stay at the facility but left before providing the second sample. Since the second test could not be performed, the test ended per D.O.T. regulations. *See* 49 C.F.R. § 40.25. Thus, Petitioner's disqualification or removal from the safety-sensitive position was a consequence of his voluntary failure to complete the test rather than a positive or unreliable test result. Had he then not absconded with his employer's tractor-trailer, he would have been eligible for rehabilitation per the D.O.T. regulations and then to continue driving for Mohawk Motors once treated and re-tested pursuant to 49 C.F.R. § 382.605. Petitioner's own actions, rather than abuse of the collection process, resulted in his termination.

Accordingly, Petitioner has no plausible basis by which to assert a cause of action for the violation of his constitutional rights under *Bivens*.

CONCLUSION

For all of the foregoing reasons, Respondent Mohawk Motors respectfully submits that the issues raised by Petitioner in the Petition for Writ of Certiorari fail to address compelling reasons for review and the Writ should therefore be denied.

Respectfully submitted,

LAURA JULIUS AVERY
Counsel of Record
ERIN STOTTLEMYER GOLD
REMINGER & REMINGER CO., L.P.A.
113 St. Clair Avenue, Suite 700
Cleveland, Ohio 44114-1273
(216) 687-1311
lavery@reminger.com

Attorneys for Respondent Mohawk Motors of Michigan, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER J. PARRY,

Plaintiff,

vs.

ARNOLD J. PRITCHARD, et al.,

Defendants

CASE NO. 1:98CV179
Judge John M. Manos

ORDER
Entered June 18, 1999

On January 27, 1998, Christopher J. Parry, plaintiff, brought suit against numerous defendants arising out of a random drug test he was required to take. On March 25, 1999, the Court granted summary judgment to the following four Defendants: (1) Mohawk Motors of Michigan, Inc., ("Mohawk"), (2) Med Express Memphis ("Med Express"), (3) Drug Free, Inc. (Drug Fee"), and (4) Austintown Ambulatory Emergency Room, Inc. ("Austintown"). On April 13, 1999, the Plaintiff filed a Motion For Reconsideration, which was denied on May 26, 1999.

On June 8, 1999, the Plaintiff filed a Motion For Leave To File a Second Amended Complaint to allege a Bivens action and bring these Defendants back into the case. Generally, Bivens actions are actions for damages arising out of a violation of one's federal constitutional rights by another acting under color of federal law. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S.

388 (1971). For the following reasons, the motion is DENIED.

The Plaintiff presumably will rely on Hammons v. Norfolk Southern Corp., 156 F.3d 701 (6th Cir. 1998), which is described in the Court's opinion denying the Motion For Reconsideration. That case left open the issue of whether a corporation engages in federal action by administering a federal drug testing program. Based on the facts described in the Court's previous opinions, the Court finds the federal action requirement of a Bivens action cannot be met.

In addition, as described in the Court's previous opinion, the Plaintiff in Hammons was given twenty-four allegedly "random" drug tests in a year and a half. Although such abuse, if proven, may invoke the Fourth Amendment right against unreasonable searches and seizures, no similar facts can be alleged here. The facts of this case cannot support a constitutional violation.

In the original Complaint, the Plaintiff brought a claim under 42 U.S.C. § 1983 for a deprivation of constitutional rights under color of state law. He dropped this claim in the Amended Complaint. He argues that the similarities between a Bivens action and a 1983 action justify leave to amend the Complaint once more. The 1983 claim, however, stemmed from Defendant Pritchard's alleged filing of a false police report accusing the Plaintiff of steeling Pritchard's truck. This claim bears no relationship to the four Defendants at issue here, and could not constitute federal action to support a Bivens claim.

For the foregoing reasons, the Plaintiff's Motion For Leave To File a Second Amended Complaint is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 1 2001
OFFICE OF THE CLERK

No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC.,
AUSTINTOWN AMBULATORY ER,
MEDEXPRESS, and
DRUG FREE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AUSTINTOWN AMBULATORY ER

STEVEN J. HUPP
Counsel of Record
BONEZZI SWITZER MURPHY & POLITO
Attorneys for Respondent
Austintown Ambulatory ER
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 875-2767

167372

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Austintown Ambulatory ER, has no parent corporation and no publicly held company owns 10% or more of its stock.

REASONS FOR DENYING THE WRIT

NEITHER THE RECORD NOR THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS ADDRESSED THE UNREASONABLE SEARCH AND SEIZURE QUESTION PRESENTED BY THE PETITION.

Petitioner's second question presented regarding the alleged abuse of process and unreasonable search and seizure under the Fourth Amendment was not alleged by the pleadings in the District Court and was not addressed by the Sixth Circuit Court of Appeals' Opinion in this case.

In the District Court, Petitioner filed his original Complaint on January 28, 1998. Almost six months later, after the parties had engaged in a substantial amount of discovery and had filed dispositive motions, Petitioner sought leave to file an Amended Complaint, which was granted. In September of 1998, after further discovery and after the District Court suspended discovery pending its decision on Respondents' summary judgment motions, Petitioner filed his First Amended Complaint. On March 25, 1999, the District Court granted summary judgment to Respondents. (Petitioner's Appendix at E-1.) On June 8, 1999, Petitioner filed a Motion for Leave to file a Second Amended Complaint, which sought to assert a *Bivens*[1] claim. Thus, Petitioner was attempting to add an entirely new legal theory after Respondents had been granted summary judgment. The District Court denied Petitioner's Leave to file a Second Amended Complaint. Accordingly, Petitioner's second question presented, *i.e.* the *Bivens* claim for a violation of

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1. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Petitioner's Fourth Amendment rights, was never even considered by the District Court.

The Sixth Circuit Court of Appeals determined that the District Court correctly denied Petitioner's Leave to file his Second Amended Complaint. Further, the Sixth Circuit Court of Appeal determined that the party seeking leave to amend his Complaint must act with due diligence, and that in any event, an amendment would have been futile since Petitioner had not stated a claim under *Bivens*. Specifically, the Sixth Circuit held:

> We do not decide whether Defendants' actions constitute federal action for purposes of a ***Bivens*** claim because, even assuming that they did, **Plaintiff has failed to allege and we do not believe that Plaintiff can allege and prove a violation of his constitutional rights.** Although Plaintiff has not alleged a violation of any specific constitutional right, this Court assumes, based on the facts, that Plaintiff would argue that his Fourth Amendment right against unreasonable searches was violated by the random drug test that he was required to take. Under the circumstances of this case, where Plaintiff, who occupies a safety sensitive position, was randomly chosen pursuant to federal regulations to take a single drug test and there is no showing of abuse of that process, we would not find a Fourth Amendment violation. [Emphasis added.]

Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 307 (6th Cir. 2000); Petitioner's Appendix at B-14.

This Court has held: "[o]ur normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) (citation omitted). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States* 355 U.S. 339, 362-363 n.16 (1958); *see Auer v. Robbins*, 519 U.S. 452, 464 (1997) (determining that the Court will not consider an argument that was inadequately preserved in the prior proceedings). This Court has determined that prudence "dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538.

In this case, Petitioner's second question presented concerning the alleged violations of his Fourth Amendment rights were neither argued before the District Court nor addressed by the Sixth Circuit Court of Appeals' Opinion. In fact, the first time that Petitioner asserted the unreasonable search and seizure issue he presents to this Court was in his Petition for Panel Rehearing, which was denied by the Sixth Circuit Court of Appeals. As such, Petitioner's second question presented is not properly before this Court and Petitioner's Writ of Certiorari should be denied.

CONCLUSION

For these reasons, Respondent Austintown Ambulatory ER respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

STEVEN J. HUPP
Counsel of Record
BONEZZI SWITZER MURPHY & POLITO
Attorneys for Respondent
Austintown Ambulatory ER
1400 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 875-2767

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No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MED EXPRESS

D. FAYE CALDWELL
Counsel of Record
CALDWELL CLINTON
& EVANS P.L.L.C.
2200 First City Tower
1001 Fannin
Houston, Texas 77002
(713) 654-3000

F. DANIEL BALMERT
VORYS, SATER, SEYMOUR
& PEASE, L.L.P.
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114
(216) 479-6100

Attorneys for Respondent LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express

167364

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether an implied private right of action exists to enforce federal drug testing regulations enacted pursuant to the Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992) and its progeny.

2. Whether Petitioner's claim under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics* was properly before the district court.

3. Whether the limited constitutional tort recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics* provides Petitioner an implied remedy for alleged procedural violations of federal urine collection and testing regulations.

PARTIES TO THE PROCEEDINGS

Petitioner is Christopher J. Parry. Respondents are LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express; Mohawk Motors of Michigan, Inc.; Austintown Ambulatory Emergency Room, Inc.; and Drug Free, Inc.

STATEMENT PURSUANT TO RULE 29.6

Respondent LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express, is a wholly owned subsidiary of Laboratory Corporation of America Holdings, which is a publicly traded company.

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Alexander v. Sandoval, __ U.S. __, 121 S. Ct. 1511 (2001) ..... *passim*

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Respondent LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express ("Med Express"), respectfully submits its response to Christopher J. Parry's ("Petitioner") petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner was an interstate truck driver. On August 6, 1997, Petitioner was selected for a random drug test as required by Federal Highway Administration ("FHWA") regulations. Petitioner proceeded to Respondent Austintown Ambulatory Emergency Room, Inc. ("Austintown ER") to submit a urine specimen. Prior to receiving Petitioner's urine specimen, the collection site attendant marked Petitioner's chain of custody form to indicate the temperature of Petitioner's urine specimen was "in range." When the collection site attendant picked up Petitioner's urine specimen, however, she noticed that the urine specimen was hot to the touch. The collection site attendant took Petitioner's temperature and measured the temperature of his urine specimen. Petitioner's temperature was 98.2 degrees Fahrenheit. The temperature of Petitioner's urine specimen was 104.6 degrees Fahrenheit.

After measuring the temperature of Petitioner's urine specimen, the collection site attendant corrected all but one of the copies of the chain of custody form to indicate the specimen was not within the proper temperature range. The correction does not appear on the Petitioner's copy of the multi-part federal drug testing chain of custody form because Petitioner had been given his copy prior to the time the collection site attendant documented the precise temperature of Petitioner's urine specimen. As required by federal

regulation, the collection site attendant sealed and shipped Petitioner's urine specimen to Med Express for testing even though the temperature of the urine specimen did not match Petitioner's body temperature. The collection site attendant then informed Petitioner that he would be required to submit a second, observed urine specimen. Petitioner left the facility before submitting a second urine specimen. Petitioner was disqualified as a FHWA interstate truck driver for interfering with the testing process.

On January 27, 1998, Petitioner filed this lawsuit in the United States District Court for the Northern District of Ohio. On March 25, 1999, the district court granted summary judgment to all movant-respondents and stayed the proceedings as to two bankrupt-defendants (these defendants are not party to these proceedings). Thereafter, on June 8, 1999, Petitioner filed a Motion for Leave to File a Second Amended Complaint. The district court denied Petitioner's motion on June 18, 1999. On July 15, 1999, Petitioner filed his motion to certify the interlocutory grant of summary judgment for appeal to the Sixth Circuit Court of Appeals. In an opinion dated December 29, 2000, the Sixth Circuit affirmed the district court's summary judgment on each of Petitioner's claims against Respondents and affirmed the district court's denial of Petitioner's motion for leave to amend.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT ISSUES APPROPRIATE FOR REVIEW BY THIS COURT.

A. There is a complete absence of controversy among the circuit courts of appeals regarding the existence of an implied private right of action to enforce federal drug testing regulations.

Petitioner asks the Court to review the Sixth Circuit's holding that no implied private right of action exists to enforce FHWA regulations enacted pursuant to the Federal Omnibus Transportation Employee Testing Act of 1991 ("FOTETA"). *See* Petition for Writ of Certiorari ("Pet."), p. 9. Each United States court of appeals that has decided whether an implied private right of action exists to enforce federal drug testing regulations, however, has held that there is no implied private right of action to enforce FOTETA. *See* Pet., App. B-19; *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 170-71 (2d Cir. 1998) (flight attendant had no private right of action to enforce FAA drug-testing regulations); *Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996) (no private right of action to enforce 49 C.F.R. § 40.35); *Abate v. Southern Pac. Transp. Co.*, 928 F.2d 167, 168 (5th Cir. 1991) (Federal Railroad Safety Act provides no private cause of action to enforce regulations implementing federally mandated drug-testing programs set out in 49 C.F.R. part 40). There is no conflict between the Sixth Circuit's decision and a decision of this Court, or that of any other United States court of appeals. Therefore, the Petition does not raise any issue of public or national interest such that the Court should review this case.

B. Petitioner's putative Fourth Amendment claim was not before the district court.

Petitioner also urges that the Sixth Circuit erred when it held that Petitioner's First Amended Complaint did not contain fair notice of Petitioner's putative *Bivens*[1] claim and that Respondents would have been unduly prejudiced by the addition of such a claim. *See* Pet., p. 22. Petitioner contends that he should have been granted leave to file a Second Amended Complaint alleging violations of Petitioner's constitutional rights secured to him by the Fourth Amendment under the limited constitutional tort recognized by the Court in *Bivens*. Leave to amend need only be granted in the absence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the other party by virtue of allowance of the amendment, or futility of amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

On June 30, 1998, after conducting extensive discovery, Petitioner filed his Motion for Leave to File his First Amended Complaint. On July 6, 1998, the district court granted Petitioner leave to file his First Amended Complaint. The district court suspended discovery in this matter on August 4, 1998. As of September 16, 1998, the date on which Petitioner filed his First Amended Complaint, each Respondent had filed its dispositive motion on each of Petitioner's claims in this lawsuit. Despite Respondents' pending dispositive motions and the cessation of discovery, Petitioner did not plead a *Bivens* cause of action in his First

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1. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Amended Complaint. On September 28, 1998, Petitioner filed a combined response to Respondents' pending motions for summary judgment. Petitioner did not request leave to add his putative *Bivens* claim until June 8, 1999, over ten months after the suspension of discovery and more than two months after the district court had granted Respondents' dispositive motions.

Petitioner relies upon Count IX of his First Amended Complaint to argue that Respondents had "fair notice" of Petitioner's putative *Bivens* cause of action. *See* Pet., p. 22. Count IX, however, merely alleges that Respondents violated FHWA and Department of Transportation ("DOT") drug testing regulations and makes no reference to any alleged violation of Petitioner's Fourth Amendment rights or a *Bivens* cause of action. Furthermore, Petitioner's First Amended Complaint does not allege that Respondents were federal actors engaged in federal action. Petitioner's First Amended Complaint did not provide Respondents with notice of a *Bivens* cause of action, and was untimely and prejudicial. The district court's denial of Petitioner's Motion for Leave to File a Second Amended Complaint, and the Sixth Circuit's decision affirming that ruling, do not provide any reason for review by the Court.

C. Petitioner's contentions require a review of factual findings adverse to Petitioner by both the district court and the Sixth Circuit.

Petitioner contends that his proposed Second Amended Complaint stating a *Bivens* claim would not have been futile because the drug test made the basis of this lawsuit was inherently unreasonable due to "various procedural problems." *See* Pet., p. 23. Petitioner's claims of perceived

procedural errors in the collection of his random urine specimen, however, require a review of factual determinations by the courts below that were ***adverse*** to Petitioner. In claiming that the random drug test made the basis of this lawsuit was inherently unreasonable, Petitioner cites to a litany of alleged deficiencies including a "time delay in taking temperature, altering chain of custody forms, leaving specimen unattended, ear thermometer placed in urine specimen for temperature measurement, specific gravity being measured in [collection site attendant's] hand. . . ." *See* Pet., p. 23.

Petitioner, however, completely ignores the record in both courts that establish that the collection site attendant measured the temperature of Petitioner's random urine specimen as being 104.6° F. *See* Pet., App. B-5; Pet., App. E-7. Petitioner also ignores the lower courts' findings that he was required to submit a second urine specimen because the temperature of Petitioner's random urine specimen was outside the range considered normal under DOT drug testing regulations, and was more than six degrees hotter than his own body temperature at the time he submitted the random urine specimen.

Petitioner was disqualified for failing to provide a second urine specimen. The temperature of Petitioner's random urine specimen is dispositive regarding a determination of the appropriateness of requiring Petitioner submit a second urine specimen. Petitioner asks this Court to review the facts in the record below and overturn findings of both the district court and the Sixth Circuit that are adverse to Petitioner. Petitioner's request fails to provide a reason for review by the Court.

II. THERE IS NO IMPLIED PRIVATE RIGHT OF ACTION UNDER FOTETA.[2]

Petitioner brought this action claiming Respondents violated FHWA drug testing regulations in the collection and testing of his August 6, 1997 random drug test. In 1991, Congress passed FOTETA, which amended the Federal Aviation Act, the Federal Railroad Safety Act, and the Commercial Motor Vehicle Safety Act to require drug testing for transportation workers in safety-sensitive positions. *See* Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 952 (1992) (codified in relevant part at 49 U.S.C. § 31306 (1996)). FOTETA directed the Secretary of Transportation to promulgate mandatory drug testing programs for commercial motor vehicle operators such as Petitioner. *See* 49 U.S.C. § 31306 (1996). FOTETA further directed the Secretary of Transportation to incorporate the Department of Health and Human Services ("DHHS") scientific and technical drug testing guidelines dated April 11, 1988, and any amendments to those guidelines, into the DOT's drug testing programs.[3] *See* 49 U.S.C. § 31306(c).

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2. On the facts of this case as alleged by Petitioner, and in the absence of any conflict of law in the U.S. courts of appeals, on its face, the Petition does not articulate any reason for review by the Court. In an abundance of caution, however, Med Express will address the lack of any substantive basis for Petitioner's request for review by the Court.

3. The DHHS procedures and requirements for drug testing and specimen collection are codified at 49 C.F.R. part 40. Each of the DOT operating administrations utilizes these specimen collection and testing regulations. *See* 14 C.F.R. § 121.457 & 14 C.F.R. App. I (Federal Aviation Administration); 49 C.F.R. § 653.61 (Federal Transit Administration); 49 C.F.R. § 219.703 (Federal Railroad Administration); 49 C.F.R. § 382.105 (Federal Highway Administration).

A. The text and structure of FOTETA demonstrate that Congress did not intend to create an implied private right of action to enforce federal drug testing regulations.

Petitioner contends that FOTETA provides him an implied private right of action to enforce DOT drug testing regulations. *See* Pet., p. 9. A private right of action to enforce federal law must be created by Congress. *See Alexander v. Sandoval*, __ U.S. __, 121 S. Ct. 1511, 1519 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (remedies available are those "that Congress enacted into law"). In determining the existence of an implied private right of action, Courts must interpret the provisions of the relevant statute to determine whether the statute displays an intent by Congress to create not just a private right, but also a private remedy.[4] *See Alexander*, 121 S. Ct. at 1519; *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). The focal point in determining the existence of a private cause of action is whether Congress, expressly or by implication, intended to create a private cause of action. *See Transamerica*, 444 U.S. at 15-16; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979); *see also Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("[W]e effectively overruled the *Cort v. Ash* analysis in *Touche Ross* [and *Transamerica*], converting one of its four factors (congressional intent) into the determinative factor.").[5]

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4. Statutory intent on this latter point is determinative. *See Alexander*, 121 S. Ct. at 1519.

5. To the extent Petitioner relies upon the three other factors enunciated by this Court in *Cort v. Ash*, those factors remain relevant (Cont'd)

Congress's intent can be determined from the text and structure of a statute. *See Alexander*, 121 S. Ct. at 1522; *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94-95 n.31 (1981) (interpretive inquiry begins with the text and structure of the statute, and ends once it has become clear that Congress did not provide a cause of action). Without the requisite congressional intent to create not just a private right but also a private remedy under FOTETA, Petitioner's claim fails. *See Alexander*, 121 S. Ct. at 1519-20. FOTETA is framed as a general mandate to the Secretary of Transportation to establish drug testing programs for transportation workers in safety-sensitive positions and develop comprehensive testing and laboratory requirements

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(Cont'd)
insofar as they assist in determining congressional intent. *See Touche Ross*, 442 U.S. at 575-76. The *Cort* factors are: (1) whether plaintiff is part of the class for whose special benefit the statute was passed; (2) whether the legislative history indicates a congressional intent to confer a private right of action; (3) whether a federal cause of action would further the underlying purpose of the legislative scheme; and (4) whether plaintiff's cause of action is a subject traditionally relegated to state law. *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810-11 (1986). Petitioner has wholly failed to cite the Court to any legislative history evidencing congressional intent to create an implied private right of action under FOTETA. Petitioner merely states, without substantiation, that the "overarching goal of 49 U.S.C. § 31306 is to protect the safety of the public and to ensure adequate protection and privacy of drivers, employees, and owner/operators through drug and alcohol testing regulations and rehabilitation programs." *See* Pet., p. 10. This is insufficient. Furthermore, Petitioner cites the Court to no support for his contention that a private cause of action would further the purpose of FOTETA's legislative scheme, or how this would be relevant in light of *Alexander*. Lastly, Petitioner fails to cite the Court to any support for his contention that his cause of action is a subject traditionally relegated to state law.

for such programs. *See* 49 U.S.C. § 31306. Like the statutes found not to create a right of action in *Alexander* and *Universities Research Assn., Inc. v. Coutu*,[6] FOTETA is phrased as a general directive to a federal agency. *See* 49 U.S.C. § 31306. A statute phrased as a directive to federal agencies provides little reason to infer a private remedy in favor of individual persons. *See Alexander*, 121 S. Ct. at 1519-20; *see also Cannon v. University of Chicago*, 441 U.S. 677, 690-92 (1979) ("far less reason to infer a private remedy" if a statute was drafted merely as a prohibition against agency disbursement of public funds to institutions not complying with federal law). The language of FOTETA provides no support for the implication that Congress intended to provide Petitioner a private right of action to enforce federal drug testing regulations. Petitioner has failed to articulate a compelling reason for review.

B. Petitioner provides the Court with no support for his claims of an implied private right of action.

Petitioner makes the disingenuous contention that because transportation workers are specifically named by FOTETA, he is a member of the class of beneficiaries for whom FOTETA was enacted. *See* Pet., p. 11. As an operator of a commercial motor vehicle, Petitioner is a regulated

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6. 450 U.S. 754 (1981). In *Coutu*, the Court determined whether section one of the Davis-Bacon Act provided a private right of action to enforce its provisions. *See Coutu*, 450 U.S. at 772. Although the statute was designed to benefit a particular class, the Court found that the enactment under consideration was framed as a general prohibition or command to a federal agency. *See id.* at 771-72. The Court held that because Congress framed the section as a directive to a federal agency, the Act's language provided no support for the implication of a private remedy. *See id.* at 772-73.

worker under FOTETA. *See* 49 U.S.C. § 31306. Statutes that focus on the person regulated rather than the individuals protected, however, create "no implication of an intent to confer rights on a particular class of persons." *See Alexander*, 121 S. Ct. at 1521 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). Furthermore, FOTETA's legislative history demonstrates that FOTETA was "designed to prevent needless deaths attributable to the use of drugs and alcohol by the operators of our transportation systems." 137 CONG. REC. S6133-02, S6137 (Sept. 17, 1991) (statement of Sen. Hollings).[7] FOTETA was not enacted for the benefit of commercial motor vehicle operators.

In *Alexander v. Sandoval*, the Court decided whether an implied private right of action existed to enforce federal agency regulations promulgated under authority of Title VI of the Civil Rights Act of 1964. *See Alexander*, 121 S. Ct. at 1521. The Court found that the statute under consideration in *Alexander* authorized federal agencies to effectuate the statute's provisions by issuing rules and regulations, or orders of general applicability, but was completely devoid of any "rights-creating" language on behalf of the class of persons protected. *See Alexander*, 121 S. Ct. at 1520-21. Likewise, FOTETA is a directive to the Secretary of Transportation to promulgate drug testing programs for transportation workers.

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7. The legislative findings accompanying the original passage of FOTETA remain applicable even though the provisions have since been revised. The statement of purpose accompanying the 1994 revision to FOTETA notes that its purpose is "to restate in comprehensive form, without substantive change, certain general and permanent laws related to transportation and to enact those laws as subtitles II, III, and V-X of title 49, United States Code, and to make other technical improvements in the Code." S. REP. No. 265, 103d Cong., 2d Sess. 1 (1994).

FOTETA focuses neither on the individuals protected nor even on the individuals being regulated, but on the agencies that will do the regulating. *See* 49 U.S.C. § 31306 (1996); *see also Alexander*, 121 S. Ct. at 1521. Like the statute in *Alexander*, the focus of FOTETA is twice removed from any congressional intent to create new rights for the persons regulated by its provisions.

To the extent that Petitioner relies upon the Ninth Circuit's opinion in *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117 (9th Cir. 2000), as support for his argument that he has an implied private right of action to enforce DOT drug testing regulations as a "specifically named beneficiary" under FOTETA, Petitioner's argument is expressly undermined by the Court's decision in *Alexander v. Sandoval*.[8] Far from displaying congressional intent to create new rights for regulated workers such as Petitioner, FOTETA focuses on those agencies effectuating a "drug testing program . . . crucial to public safety." *See* 137 CONG. REC. S6133-02, S6138 (Sept. 17, 1991) (statement of Sen. Danforth). Petitioner has failed to identify a compelling reason for granting Certiorari in this appeal.

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8. Petitioner's reliance on *First Pacific Bancorp, Inc. v. Helfer* is misplaced. 224 F.3d 1117 (9th Cir. 2000). The issue in *First Pacific* was whether a federal statute gave shareholders of a bank in FDIC receivership a private right of action against the FDIC to compel it to make available to such shareholders FDIC-prepared annual reports of receivership as provided for by the text of the statute. *See First Pacific*, 224 F.3d at 1122. It is doubtful that the Ninth Circuit would concur with Petitioner's contentions regarding its holding in *First Pacific*, given the court's express recognition that general directives to federal agencies carry "no implication of an intent to confer rights on a particular class of persons." *See First Pacific*, 224 F.3d at 1122-23 (citation omitted).

C. DOT and FHWA regulations cannot create an implied private right of action.

Petitioner contends that certain provisions of DOT drug testing regulations and interpretive guidelines contain "rights-creating" language and therefore must be privately enforceable. *See* Pet., p. 19. Specifically, Petitioner relies upon a FHWA regulation that mandates transportation employees be provided information explaining drug testing, and a DOT drug testing regulation that states that transportation employees may not be required to waive negligence by others.[9] *See* Pet., p. 20. An agency regulation, however, cannot create a private right. *See Alexander v. Sandoval*, 121 S. Ct. 1522; *Touche Ross*, 442 U.S. at 577 n.18 ("[T]he language of the statute and not the rules must control"). Petitioner's argument that DOT drug testing regulations and interpretive guidelines contain "rights-creating" language and are consequently privately enforceable therefore skips an important analytical step. *See Alexander*, 121 S. Ct. at 1522.

The Court recently re-affirmed that agency regulations cannot imply the existence of a private cause of action. *See Alexander*, 121 S. Ct. at 1522. In the absence of congressional intent to provide a private right of action, no amount of "rights-creating" language in agency regulations

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9. "The employee may not be required to waive negligence on the part of any person participating in the collection, handling or analysis of the specimen or to indemnify any person for the negligence of others." 49 C.F.R. § 40.25(f)(22)(ii) (1997). Petitioner also relies upon a DOT drug testing regulation that states that the quantification of test results may be disclosed "to the decisionmaker in a lawsuit, grievance, or other proceeding." *See* 49 C.F.R. § 40.29(g)(3) (1997).

will create one. *See id.* ("Agencies may play the sorcerer's apprentice but not the sorcerer himself.").[10] The language relied upon by Petitioner in DOT and FHWA regulations does not manifest an intent by Congress to create a private right of action to enforce federal drug testing regulations. Therefore, Petitioner has failed to identify a compelling reason for granting review in this case.

D. Petitioner's policy argument regarding his alleged lack of a remedy fails.

Petitioner misstates the law when he alleges that there are no enforcement mechanisms available to drivers aggrieved by alleged violations of the drug-testing regulations, thereby leaving individuals such as Petitioner without a remedy. *See* Pet., p. 17. An individual may make a complaint of alleged violations of the drug testing regulations to the Secretary of Transportation. The Secretary is required to investigate nonfrivolous written complaints regarding substantial violations of commercial motor carrier safety regulations. *See* 49 U.S.C. § 31143(a) (1996). The Secretary may receive evidence, issue subpoenas, and conduct hearings to determine the merits of such complaints. *See* 49 U.S.C. § 31133(a) (1996 & 2000 Supp.). If the Secretary finds

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10. Furthermore, Petitioner cannot bring a lawsuit pursuant to a federal statute for alleged violations of DOT or FHWA regulations, where the alleged violations are not specifically prohibited by the ***text*** of the statute. *See Alexander*, 121 S. Ct. at 1522 (emphasis added); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]"). Drug testing and collection procedures are not part of the text of FOTETA. *See* 49 U.S.C. § 31306.

a violation, the Secretary is required to inform the party in violation of DOT safety regulations what action might be taken in order to abate the violation. *See* 49 U.S.C. § 521(b)(1)(A) (2000 Supp.). The Secretary may also impose civil penalties on parties found to be in violation of DOT safety regulations, after notice and an opportunity for a hearing. *See* 49 U.S.C. § 521(b)(2) (2000 Supp.). The Secretary may also bring civil actions to enforce DOT safety regulations against commercial motor carriers. *See* 49 U.S.C. § 507(a)(2) (1996).

The FHWA's regulations reflect Congress's express provision for enforcement of motor carrier safety regulations. *See* 49 C.F.R. part 386. The FHWA provides administrative procedures and rules for proceedings

> to determine whether any motor carrier, its agent, employee or other person subject to the jurisdiction of the FHWA under [the Commercial Motor Vehicle Safety Act and the Motor Carrier Safety Act] has failed to comply with any provision or requirements of those statutes or regulations issued under them and, if such a violation is found to issue an appropriate order to compel compliance with the statute or regulation, assess a civil penalty, or both.

See 49 C.F.R. § 386.1. Petitioner had a remedy for his perceived wrongs. He could have filed a complaint with the Associate Administrator of the FHWA regarding his claims of alleged violations of drug testing regulations. *See* 49 C.F.R. § 386.12. He chose not to do so.

The DOT's comprehensive statutory enforcement mechanism is evidence of congressional intent as to who has the power to enforce DOT drug testing regulations.[11] *See Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996). Furthermore, the express provision of a comprehensive remedial scheme is some evidence that Congress intended to preclude other remedies. *See Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989) ("[W]here a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. . . . In such cases, '[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.' "). Without congressional intent to provide a private remedy, a private cause of action does not exist and courts may not create one, no matter how desirable a private remedy may be as a policy matter, or how compatible such an action may be with the purpose of the statute. *See Alexander*, 121 S. Ct. at 1520; *see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 148 (1985); *Transamerica*, 444 U.S. at 23; *Touche Ross*, 442 U.S. at 575-76. Petitioner has failed to identify a reason for review by the Court.

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11. "The six operating administration rules to which part 40 [drug testing] procedures apply are part of existing ***statutory*** and regulatory systems. Generally, they will be enforced in the same way as the rest of those systems. For example, FAA and FHWA personnel inspect the equipment and records of the carriers they regulate. If they find rule violations, they may initiate enforcement proceedings and impose civil penalties. The FAA and FHWA personnel would add review of compliance with drug testing requirements to the other checks they make of employers' compliance with safety rules." *Enforcement Considerations*, 54 Fed. Reg. 49,854, 49,865 (December 1, 1989) (emphasis added).

III. *BIVENS* DOES NOT PROVIDE PETITIONER A REMEDY.

A. The Fourth Amendment is not implicated by alleged procedural violations of drug testing regulations.

Petitioner alleges that the random drug test made the basis of this lawsuit was inherently unreasonable due to violations of drug testing regulations during the collection of his urine specimen. *See* Pet., p. 23. Petitioner argues that, under *Bivens*, he is therefore entitled to recover money damages from Respondents for alleged violations of his rights under the Fourth Amendment. *See* Pet., p. 22. Petitioner has never, however, alleged that his **selection** for the random drug test made the basis of this lawsuit violated his constitutional rights. Upon *de novo* review of the record in this lawsuit, the Sixth Circuit held that even if Petitioner had been allowed to make a Fourth Amendment claim, on the facts of this lawsuit, such a claim would fail to state a claim for which relief could be granted. *See* Pet., App. B-14–B-15.

This Court has held that suspicionless drug testing of employees in safety-sensitive jobs is consonant with the Fourth Amendment where the testing is part of a systematic, uniformly applied testing program. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989). In *Skinner* and *Von Raab*, the Court concluded that the drug testing at issue was permissible without the usual protection of a warrant based on probable cause, and even without "any measure of individualized suspicion." *See Von Raab*, 489 U.S. at 668; *Skinner*, 489 U.S. at 633. In *Skinner*, railroad employees' privacy expectations, which were limited

because of the industry's pervasive regulation, were outweighed by the government's compelling interest in ensuring the safe operation of the rails. *See Skinner*, 489 U.S. at 633. In *Von Raab*, the Court similarly found that the government's interests in safety and the integrity of its borders outweighed the individual privacy interests of customs officials who carry firearms or are involved in drug interdiction. *See Von Raab*, 489 U.S. at 668.

In both of these cases, "the circumstances justifying toxicological testing and the permissible limits of such intrusions [we]re defined narrowly and specifically" by the drug testing programs at issue. *Skinner*, 489 U.S. at 622; *Von Raab*, 489 U.S. at 667 (citing *Skinner*, *supra*). The Court found that because "minimal discretion [was] vested in those charged with administering the program," a search warrant authorized by a neutral magistrate is less crucial than in other Fourth Amendment contexts. *Skinner*, 489 U.S. at 622; *see also Von Raab*, 489 U.S. at 667 (every employee seeking a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test). Petitioner does not contend that his selection for the drug test made the basis of this lawsuit was contrary to a systematic, uniformly applied testing program. *See* Pet., p. 28. Petitioner contends that alleged violations of DOT urine specimen collection procedures made an otherwise permissible search unreasonable under the Fourth Amendment.

In *Drake v. Delta Airlines, Inc.*, the Second Circuit examined the difference between the plaintiff's claims of alleged violations of drug testing procedures and his claim that his selection for a random drug test was not truly random. 147 F.3d 169, 171-72 (2d Cir. 1998). In analyzing the

plaintiff's claims, the Second Circuit held that the plaintiff's allegations of violations of DOT drug testing regulations failed to state a claim for which relief may be granted because FOTETA does not provide an implied private right of action. *See id.* at 170-71. In reviewing the plaintiff's complaint, however, the Second Circuit found that the plaintiff's pleadings could be construed to allege that the plaintiff's selection for the drug test made the basis of the lawsuit was not randomly administered. *See id.* at 172. The Second Circuit held that the plaintiff's allegation that he was not randomly selected for testing pursuant to a systematic, uniformly applied drug testing program was sufficient to make out a *prima facie* claim of unreasonableness under the Fourth Amendment. *See id.*

In *Drake*, the Second Circuit properly draws the distinction between: (1) an employer's impermissible exercise of discretion in requiring a transportation employee to submit to a drug test contrary to a systematic, uniformly applied random selection program, and (2) alleged violations of urine specimen collection and testing regulations after a properly random selection. *See Drake*, 147 F.3d at 171-72. An allegation of an abuse of the former is sufficient to make out a *prima facie* claim of unreasonableness under the Fourth Amendment. *See Drake*, 147 F.3d at 172; *see also Hammons v. Norfolk Southern Corp.*, 156 F.3d 701, 702 (6th Cir. 1998) (allegation that plaintiff was subjected to twenty-four random drug tests in year and a half); *Rutherford v. City of Albuquerque*, 77 F.3d 1258, 1261 (10th Cir. 1996) (officials departed from substance abuse policy and wrongfully exercised discretion in deciding plaintiff should be tested). An allegation of the latter fails to state a claim for which relief may be granted. *See Drake*, 147 F.3d at 170-71. Petitioner's claim of alleged violations of DOT regulations

does not make out a *prima facie* claim of constitutional injury. Petitioner complains only of alleged violations of DOT and FHWA drug testing regulations. Petitioner has therefore failed to identify a compelling reason for review in this case.

B. Special factors counsel hesitation in recognizing a *Bivens* cause of action in this context.

Petitioner argues that *Bivens* provides him a remedy for alleged procedural violations of DOT drug testing regulations. *See* Pet., p. 22. A *Bivens* remedy does not lie in two situations: (1) where Congress has provided an equally effective alternative remedy and declares it to be a substitute for recovery under the Constitution, and (2) where, in the absence of affirmative action by Congress, there are special factors that counsel hesitation. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980).[12] In each instance that the Court has extended the scope of *Bivens*, as in *Bivens* itself, the Court has found that there were no "special factors counseling hesitation in the absence of affirmative action by Congress,"

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12. Negligence will not generally serve as the basis for a claim for violations of constitutional rights secured by the Fourth and Fifth Amendments. *See Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required); *see also Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (mere lack of due care by a state official cannot "deprive" an individual of life, liberty, or property under the Fourteenth Amendment); *Dodd v. City of Norwich*, 827 F.2d 1, 3 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) (Fourth Amendment proscribes only unreasonable searches and seizures, not those conducted in a negligent manner). To the extent Petitioner attempts to use *Bivens* as an end-run around the absence of an implied private right of action under FOTETA, his contentions should be summarily dismissed.

no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy. *See Davis v. Passman*, 442 U.S. 228, 246-47 (1979); *Carlson*, 446 U.S. at 18-20. The concept of special factors counseling hesitation in the absence of affirmative action by Congress includes "an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). In recent decisions, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (citing *Schweiker*, 487 U.S. at 421).[13]

"When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, the Court has declined to create additional *Bivens* remedies." *Schweiker*, 487 U.S. at 423.[14] In this case, there is more than a suggestion

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13. The absence of statutory relief for a constitutional violation does not, by itself, give rise to an implied damage remedy. *See Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988); *see also Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983) (no implied damage remedy available even in the absence of a meaningful statutory remedy).

14. In *Bush v. Lucas*, the Court refused to create a *Bivens* action even though it assumed a First Amendment violation with relation to an adverse employment action and acknowledged "existing remedies do not provide complete relief for the plaintiff." *See Bush v. Lucas*, 462 U.S. 367, 388 (1983). In *Schweiker v. Chilicky*, the Court again refused to create a *Bivens* action for alleged due process violations in the denial of Social Security disability benefits. *See Schweiker*, 487 U.S. at 429. In refusing to extend *Bivens*

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in the "design" of the DOT drug testing program that Congress provided what it considered adequate remedial mechanisms for violations that may occur in the course of the administration of those programs. Congress created a comprehensive statutory enforcement scheme designed to ensure compliance and to redress violations of those regulations created by the DOT. *See* discussion, *supra*. The safeguards provided by Congress in promulgating FOTETA "include a requirement that testing follow Department of Health and Human Services guidelines; that initial screening tests be followed up by confirmatory tests by laboratories that meet rigorous certification standards, and that the confidentiality of the results and medical histories be protected." 137 CONG. REC. S13170-02, S13172 (Sept. 17, 1991) (statement of Sen. Hollings). The legislative history of FOTETA therefore establishes that Congress considered the adequacy of the safeguards built in to the DHHS certification process and federal workplace drug testing procedures, and judged the regulatory enforcement authority of the DOT operating administrations sufficient to prevent and, when necessary, remedy violations of employee's rights under the DOT drug testing program. Petitioner asks the Court to extend a *Bivens* remedy into this heavily regulated realm of commercial transportation. The Court should decline Petitioner's invitation "to create a new substantive legal liability without legislative aid because . . . Congress is in a better position to decide whether or not the public interest would be served by creating it." *See Bush v. Lucas*, 462 U.S. 367, 390 (1983) (citation omitted).

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remedies in *Schweiker* and *Bush*, the Court found the *Bivens* remedy displaced because Congress had legislated an elaborate and comprehensive remedial scheme. *See Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 388.

C. Petitioner fails to state a claim for a violation of his constitutional rights.

1. *Petitioner's random drug test did not violate Petitioner's constitutional rights.*

Petitioner's allegation of "various procedural problems" during the collection of his urine specimen does not implicate his rights under the Fourth Amendment. *See* Pet., p. 23.[15] This Court has acknowledged the vital governmental interest in ensuring the sobriety and fitness of operators of dangerous instrumentalities or equipment such as Petitioner. *See Skinner*, 489 U.S. at 628. "[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624; *see also Von Raab*, 489 U.S. at 665-66. The drug testing regulations codified at 49 C.F.R. part 40 were considered by this Court in *Von Raab* to the extent they supplemented or displaced the Commissioner of Customs' directive. *See Von Raab*, 489 U.S. 661 n.1. To the extent these regulations were not considered by this Court in *Von Raab*, the drug testing regulations codified at

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15. One of Petitioner's complaints regarding the collection of his random urine specimen is that there was an alleged "time delay in taking [the] temperature" of the urine specimen. *See* Pet., p. 23. Although there is no evidence to support this assertion, any delay in measuring the temperature of Petitioner's urine specimen would have resulted in a ***lower*** temperature. As it was, the urine specimen provided by Petitioner was measured as being 6.4° F higher than his body temperature at the time the specimen was submitted, which is a reasonable basis to suspect that Petitioner's urine specimen had been adulterated.

49 C.F.R. part 40, and in force as of 1997, closely track the regulations sanctioned by this Court in that case. *See* 489 U.S. at 672-73 n.2. Petitioner alleges only procedural violations of those urine specimen collection regulations.[16]

In an effort to make a colorable claim under the Fourth Amendment, Petitioner relies heavily upon the Arkansas Supreme Court's decision in *Stueart v. Arkansas Police Comm'n*.[17] *See* Pet., p. 25. *Stueart* involved a state employee's challenge of the state police commission's decision to affirm his termination for testing positive for a controlled substance. *See Stueart*, 945 S.W.2d at 378. In *Stueart*, the Arkansas Supreme Court reviewed that commission's decision and found that the commission's decision was based upon administrative findings that were not made in accordance with required agency procedure. *See id.* The Arkansas Supreme Court overturned the commission's decision because the commission ignored its own rules in upholding the plaintiff's termination. *See id.* at 379. *Stueart* merely reiterates an Arkansas rule of law that a decision of a state administrative agency will be overturned if the substantial rights of an administrative petitioner are prejudiced by administrative findings made upon unlawful procedure. *See id.* at 380.[18]

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16. One of Petitioner's perceived procedural violations of the regulations was the use of an "ear thermometer" to measure the temperature of his urine specimen. *See* Pet., p. 23. Petitioner's complaint regarding the *method* of temperature measurement is irrelevant. Both of the courts below found that Petitioner's urine specimen was accurately measured as 104.6° F.

17. 945 S.W.2d 377 (Ark. 1997).

18. The *Stueart* court expressly found that numerous procedural violations in the collection of the urine specimen at issue did not

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The *Stueart* court did not hold that a violation of Arkansas drug testing regulations constituted a violation of the plaintiff's Fourth Amendment rights. *See id.* The *Stueart* opinion is inapposite to Petitioner's factual and legal allegations in this lawsuit. Petitioner was disqualified for failing to submit a second urine specimen after the temperature of his random urine specimen was measured as being outside the range of 90°-100° F. Petitioner presents the Court with no support for his contention that alleged violations of DOT drug testing regulations violated his constitutional rights and has therefore failed to identify any reason for review in this case.

2. *The collection of the second urine specimen was constitutionally permissible.*

Petitioner contends that the requirement that he submit a second urine specimen was based upon non-existent regulations and was therefore unreasonable. *See* Pet., p. 28.[19]

(Cont'd)
affect the reliability of the drug test where the procedural violations were cured by subsequent testimony. *See Stueart*, 945 S.W.2d at 379. Similarly, in this lawsuit, the collection site attendant testified that she initially made an error regarding the temperature of Petitioner's random urine specimen and further testified as to the steps she took to correct and document the error. *See* Pet., pp. 3-4.

19. Med Express does not read Petitioner's argument as a facial challenge to individualized "reasonable suspicion" drug testing. FOTETA does, however, provide for drug testing upon individual suspicion of drug use. *See* 49 U.S.C. § 31306(b). If Petitioner is making a facial challenge to drug testing based upon individualized suspicion, such testing of transportation employees in safety-sensitive positions is consonant with the Fourth Amendment. *See Skinner*, 489 U.S. at 624 (drug test reasonable absent individual suspicion).

Petitioner, however, ignores the record in both courts below that established Petitioner's urine specimen was measured as having a temperature of 104.6° F. *See* Pet., App. B-5; Pet., App. E-7. DOT drug testing regulations require that when there is reason to believe a specimen has been adulterated, a second observed specimen "***shall*** be obtained as soon as possible." *See* 49 C.F.R. § 40.25(f)(16) (1997) (emphasis added). A urine specimen temperature outside the range of 32°-38° C/90°-100° F constitutes reason to believe that a specimen donor has altered or substituted the specimen. *See* 49 C.F.R. § 40.25(f)(13) (1997). Having reason to believe the specimen was adulterated, the collection site attendant informed Petitioner that he would be required to provide a second, observed urine specimen and that Petitioner was not to leave the clinic. Petitioner left the clinic without providing a second urine specimen. Petitioner was disqualified as a DOT truck driver for failing to provide a second urine specimen.

Drug testing of transportation workers in safety-sensitive positions is consonant with the Fourth Amendment when there is individualized "reasonable suspicion" of a violation of the prohibition against controlled substances. *See Skinner*, 489 U.S. at 624 (drug test reasonable absent individual suspicion); *see also Drake*, 147 F.3d at 172; *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996); *Ford v. Dowd*, 931 F.2d 1286, 1290-92 (8th Cir. 1991); *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 868 F.2d 74, 77 (3d Cir. 1989). Petitioner submitted a urine specimen with a temperature of 104.6° F. *See* Pet., p. 3. Petitioner's body temperature at the time he submitted his random urine specimen was measured as 98.2° F. *See* Pet., p. 3. Based upon these facts, there was a reasonable basis for an individualized suspicion that Petitioner violated FHWA drug testing regulations.

The FHWA's compelling public safety and security interest did not dissipate after Petitioner's submission of his random urine specimen. *See Skinner*, 489 U.S. at 628 (such employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences" and make judgments that "can cause great human loss before any signs of impairment become noticeable to supervisors or others"). Petitioner therefore suffered no constitutional injury when he was required to submit a second urine specimen based upon individualized suspicion of adulteration after he provided a urine specimen that was more than **six degrees hotter** than his own body temperature. *See* Pet., p. 3. Petitioner has failed to identify any basis for review in this case.

CONCLUSION

Each United States court of appeals to decide whether an implied private right of action exists to enforce federal drug testing regulations has held that no such cause of action exists. The district court's decision to deny Petitioner leave to amend his pleadings after entry of judgment against him is not a reason for the Court to review this case. Petitioner's requested review of factual determinations by the courts below is also not a reason for the Court to review this case. Lastly, the limited implied constitutional tort recognized by this Court in *Bivens* does not provide Petitioner a remedy for alleged violations of federal urine collection and testing regulations. The issues presented in the petition for writ of certiorari do not raise issues of great public importance or national interest such that this Court should devote its limited time and resources to a review.

Med Express respectfully requests this Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

D. FAYE CALDWELL
Counsel of Record
CALDWELL CLINTON
& EVANS P.L.L.C.
2200 First City Tower
1001 Fannin
Houston, Texas 77002
(713) 654-3000

F. DANIEL BALMERT
VORYS, SATER, SEYMOUR
& PEASE, L.L.P.
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114
(216) 479-6100

Attorneys for Respondent LabCorp Occupational Testing Services, Inc., f/k/a National Laboratory Center, Inc., operating under the service mark of Med Express

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No. 00-1655

IN THE

Supreme Court of the United States

CHRISTOPHER J. PARRY,

Petitioner,

v.

MOHAWK MOTORS OF MICHIGAN, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DRUG FREE, INC.

ERNEST L. WILKERSON, JR.
KATHRYN M. MILEY*
WILKERSON AND ASSOCIATES CO., LPA
Attorneys for Respondent
Drug Free, Inc.
1422 Euclid Ave., Suite 248
Cleveland, Ohio 44115
(216) 696-0808

* *Counsel of Record*

167336

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court properly held that the Department of Transportation Regulations do not create an express private cause of action or support the existence of an implied cause of action.

2. Whether the trial court properly denied Petitioner's Second Motion for Leave to Amend the Complaint since he had not shown just cause for the amendment or that the new complaint would survive a motion to dismiss.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner Christopher Parry was an independent contractor of A.P.I.C. Petitioner's services were leased to Respondent Mohawk Motors of Michigan. Petitioner was selected for a random drug test required by the federal Department of Transportation Regulations. Respondent Austintown Ambulatory Emergency Room served as the collection site; Respondent MedExpress was the laboratory analyzing the sample; Respondent Defendant Drug Free, Inc. and its employee Dr. James Baber[1] served as the Medical Review Officer.

Respondent, Drug Free, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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1. Petitioner, the Court of Appeals, and the trial court incorrectly identify Dr. Baber as Dr. Haber.

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REASONS FOR DENYING THE WRIT

I. Petitioner has not met the standards for a petition for certiorari.

In his Petition for Certiorari, Petitioner does not offer any compelling reasons for this Court to grant certiorari as required by the Rules of the Supreme Court. Sup. Ct. R. 10. There is not a conflict between federal courts on an employee's right to bring a private cause of action under the Department of Transportation Regulations. In fact, the lower courts' rulings in this case conformed with the decisions of all courts who have addressed the issue, finding that there is no private right of action under the regulations promulgated pursuant to the Federal Omnibus Transportation Employee Testing Act (hereinafter "FOTETA"). *Salomon v. Roche Compuchem Laboratories, Inc.*, 909 F. Supp. 126 (E.D.N.Y. 1995); *Schmeling v. Nordam*, 97 F.3d 1336 (10th Cir. 1996); *Hall v. United Labs, Inc.*, 31 F. Supp. 2d 1039 (N.D. Ohio 1998); *Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387, 391 (N.D. N.Y. 1996).

Petitioner is, in fact, arguing that the trial and appellate courts' misapplied the *Cort v. Ash* test in considering whether there was a private cause of action for violation of the FOTETA Regulations and whether the trial court abused its discretion in refusing to allow him to amend his Complaint for the second time. *See* Petition for Writ of Certiorari, pages 9 & 22. Such issues are not appropriate for consideration by this Court since they do not raise any significant federal questions or seek to resolve a conflict between the lower courts. The Sixth Circuit's ruling was a correct application of the law, and, therefore, Respondent Drug Free, Inc. urges this Honorable Court to deny the Petition for Writ of Certiorari.

II. The Department Of Transportation Regulations Do Not Create An Implied Private Cause Of Action For Drivers.

Neither the Federal Omnibus Transportation Employee Testing Act ("FOTETA") nor the regulations promulgated thereunder expressly create a private cause of action. *See* 49 U.S.C. § 45102(a) & 49 C.F.R. §§ 40.21-40.39. Since a private cause of action is not expressly created by these provisions, the plaintiff must be able to demonstrate a clear Congressional intent to create a private remedy by the legislative scheme. *Salomon v. Roche Compuchem Laboratories, Inc.*, 909 F. Supp. 126, 128 (E.D.N.Y. 1995). The standard for determining whether an implied right of action exists under *any* federal statute: is (1) whether the plaintiff is part of the class of individuals that the statute was designed to benefit; (2) whether the legislative history indicates congressional intent to confer a private remedy; (3) whether creating a private remedy would further the purpose of the statute; and (4) whether plaintiff's cause of action is more related to state law. *Salomon*, 909 F. Supp. at 128 (citing *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *California v. Sierra Club*, 451 U.S. 287, 293 (1981); *Cort v. Ash*, 422 U.S. 66, 78 (1975)). These factors are used to determine whether Congress intended to create a private cause of action. *California v. Sierra Club*, 451 U.S. 287, 293 (1981).

A. The Petitioner is not part of the class of individuals that the statute was designed to benefit.

FOTETA authorized the Department of Transportation to establish drug testing programs "in the interest of motor safety." 49 U.S.C. § 31306(b). The Regulations state that

they are intended to prevent accidents and injuries from the use or misuse of alcohol and controlled substances. 49 C.F.R. § 382.101.

The statute and Regulations were not intended to benefit the privacy rights of individual drivers, but expressly authorized the invasion of those privacy rights. For example, if the circumstances warrant it, the employer can require an observed collection. 49 C.F.R. §§ 40.25(e)(ii) & (f)(16).

The fact that the statute and regulations mention the individual drivers does not establish that they were the intended beneficiaries of the statute. Petitioner's reliance on *First Pacific Bancorp, Inc. v. Helfer* is misplaced. *See* Petition, page 13 (citing 224 F.3d 1117 (9th Cir. 2000)). *First Pacific* analyzed whether shareholders had a private cause of action against the FDIC. *Id.*

In *First Pacific*, the court found that the individual shareholders were placed "on the same footing as the governmental authorities and with the general public . . ." in the statute. *Id.* 1121. There is no statutory or regulatory language in FOTETA or the regulations giving such status to truck drivers.

B. The legislative history does not indicate congressional intent to confer a private remedy.

The legislative history of FOTETA does not offer any indication of congressional intent to create a private cause of action for drivers. Congress specifically allowed for administrative enforcement of drug testing regulations through the administrative mechanism. *See, e.g.*, 49 U.S.C. §§ 507, 521, 31133, 31136, 31143,

31144, 31502. *See also* 49 C.F.R. § 382.1. "Such enforcement mechanisms are strong indicia that Congress did not envision a private right of action under the FAA's drug testing regulations . . ." *Drake v. Delta Airlines, Inc.*, 923 F. Supp. 387, 391 (E.D.N.Y. 1996) (citing *Chan v. City of New York*, 1 F.3d 96, 102 (2d Cir. 1993).

This analysis has been repeated by various courts with the same result. In *Schmeling v. Nordam*, the Tenth Circuit Court of Appeals concluded that:

> Nowhere has Congress manifested an intent to allow a person other than the FAA Administrator or the Attorney General to enforce the drug-testing laws . . . we find no evidence that Congress intended to create a cause of action asserted by Schmeling, and we conclude that such a right does not exist.

97 F.3d 1336, 1337 (10th Cir. 1996). *See also Hall v. United Labs, Inc.*, 31 F. Supp. 2d 1039, 1042 (N.D. Ohio 1998).

Petitioner again relies on *First Pacific* for the proposition that when there is Congressional silence, the Court is free to create an implied cause of action. *See* Petition, page 13 (citing *First Pacific*, 224 F.3d at 1125). But as this Court has stated, "implying a private right of action on the basis of congressional silence is a hazardous enterprise at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 573 (1979). If there is to be a private right of action under a federal statute, "Congress must provide it. '[I]t is not for [the Court] to fill any hiatus Congress has left in this area.' " *Id.* at 578 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963).

The legislative history is silent on whether there is a private cause of action under FOTETA. However Congress specifically created an administrative enforcement mechanism. This is sufficient evidence that Congress did not intend to create a private cause of action under the statute.

C. Creating a private remedy would defeat the purpose of the statute and regulations.

Petitioner refers yet again to *First Pacific* to establish that a private remedy is consistent with the statute. *See* Petition, page 15. However, *First Pacific* actually demonstrates that a private remedy in the drug testing field would defeat the purposes of the statute and regulations.

In *First Pacific*, the court found that since there was not an administrative remedy, there must be a private remedy. 224 F.3d at 1126. In this case, there *is* an administrative remedy. *See, e.g.*, 49 U.S.C. §§ 507, 521, 31133, 31136, 31143, 31144, 31502. *See also* 49 C.F.R. § 382.1.

In addition, the *First Pacific* plaintiff sought an equitable remedy which would not defeat the Congressional intent or the administrative authority. 224 F.3d at 1125. Here, if Petitioner was awarded any equitable relief, it would be in direct conflict with the administrative regulations. The trial court would have to order the other parties to directly defy the regulations and the statute. Allowing a private remedy under FOTETA and the regulations would defeat the purpose of the statute, since drivers could circumvent regulations by seeking other remedies from a judge or jury.

The regulations' language regarding waiver does not establish that the Department of Transportation intended to

create a private cause of action. *See* Petition, page 20. The language cited only states that employees cannot be forced to waive liability. 49 C.F.R. § 40.25. Even if an employee cannot maintain a cause of action directly under the federal statutes and regulations, he or she can attempt to maintain a common law cause of action, which Appellant did in this case in his pendent claims.[2] *See* First Amended Complaint.

Neither Congress nor the Department of Transportation intended to create a private cause of action for individual drivers under FOTETA or the drug testing regulations. Therefore, this Court should decline to create such a cause of action now.

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2. Incidentally, if the Department of Transportation intended the regulations to create a private right of action, it almost certainly would have intervened in this action when requested by Petitioner or in one of the other cases on this issue across the county. *See* Plaintiff-Appellant Parry's Motion for Enlargement of Time to File Proof Brief, filed in the Sixth Circuit. It is also interesting to note that the Department of Transportation did *not* add any regulations on judicial remedy when the subject regulations were amended this past year. *See* Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 65 Fed. Reg. 79461 (2000) (to be codified at 49 C.F.R., Part 40). *See also* Workplace Drug and Alcohol Testing Programs; Amendments to DOT Agency Rules Conforming to Department of Transportation Final Rule; Proposed Rules, 66 Fed. Reg. 21491 (2000).

III. THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR LEAVE TO AMEND HIS COMPLAINT FOR THE SECOND TIME.

Rule 15 of the Federal Rules of Civil Procedure dictates the requirements of amending pleadings. After responsive pleadings have been filed, leave of the court is required to amend. Fed. R. Civ. P. 15(a) "[L]eave shall be freely given when justice so requires." *Id.* The court is not required to allow an amendment when there is undue delay, bad faith, dilatory motives, undue prejudice to the opposing party, or when the amendment would be futile. *Bethany Pharmacal Company, Incorporated, v. QVC, Incorporated*, 241 F.3d 854, 861 (7th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir. 1992); *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir. 1991)).

A. Petitioner's Motion for Leave to File Second Amended Complaint was untimely and prejudicial.

In this case, Petitioner did not demonstrate that justice required that he be granted leave to amend. He had been given leave to amend once, resulting in further delay and an even more confusing Complaint. *See* First Amended Complaint. The First Amended Complaint gave no notice of a future *Bivens* action. Then, Petitioner delayed nine more months and waited until the Motions for Summary Judgment were granted and a Motion for Reconsideration was denied to attempt to amend his Complaint again. *See* Motion for Leave to File Second Amended Complaint. This Motion caused undue delay and was made in bad faith.

In neither his Petition nor his Motion for Leave did Petitioner make an effort to demonstrate that justice required that he be given leave to amend. *See* Motion for Leave to File Second Amended Complaint and Petition, page 22.

Both the trial court and the Court of Appeals found it significant that Petitioner waited until

> nine months after he filed his first amended complaint and well over a year after he filed his original complaint. Moreover, at the time Plaintiff filed his motion to amend, the district court had granted summary judgment to Defendants two and one-half months earlier as well as denied Plaintiff's motion for reconsideration.

Parry v. Mohawk Motors of Michigan, Inc., 236 F.3d 299, 306 (2000). Since an additional amendment would result in undue delay, bad faith, dilatory motives, and undue prejudice to the opposing party, the Motion for Leave to Amend was properly denied.

B. Petitioner's Second Amended Complaint would be futile.

Finally, "leave to amend should not be granted if the amended complaint should not withstand a motion to dismiss." *Fisher v. Roberts*, 125 F.3d 974, 978 (6th Cir. 1997). Petitioner claims that he is attempting to maintain a *Bivens* action in his proposed Second Amended Complaint for violations of his Fourth Amendment rights. *See* Petition, page 22. The *Bivens* Court held that when a "federal agent acting under color of his authority" violates the Constitution, the victim may recover damages from the agent. *Bivens v.*

Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

Drug testing regimes are clearly within the parameters of the protection of the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617-18 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676-79 (1989). The Fourth Amendment, however, bars only unreasonable searches. *Skinner*, 489 U.S. at 619.

> What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Id. at 619 (citations omitted).

Petitioner argues that a violation of the drug testing regulation is, in itself, an abuse of process constituting a Fourth Amendment violation. *See* Petition, page 23. The Second Circuit discussed the distinction between a violation of drug testing procedures and a Fourth Amendment violation. *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 171-72 (2d Cir. 1998). There is a distinction between impermissible abuse of discretion in requiring an employee to submit to a drug test contrary to a systematic, uniformly applied testing program, and alleged violations of urine specimen collection and testing procedures. *Id.* at 171-72. While the former category is adequate to make out prima

facie claim of a constitutional violation, the latter fails to state a claim upon which relief can be granted. *Id.*[3]

Finally, the facts of the present case counsel hesitation by this Court. A *Bivens* action is not created in situations where special factors "counsel hesitation." *Carlson v. Green*, 446 U.S. 14, 16-20 (1980); *Davis v. Passman*, 442 U.S. 228, 245-46 (1979). This analysis includes judicial deference to indications that Congressional inaction was intentional. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). When a program framework suggests that Congress has provided all enforcement mechanism that it deemed necessary, the Supreme Court has declined to provide new *Bivens* remedies. *Id.*

A *Bivens* action is inapplicable to the present matter. Petitioner's claim that the regulations were not followed does not automatically establish a Fourth Amendment violation. In addition, special circumstances counsel against extending this cause of action to the present situation since Congress clearly did not intent to create a private cause of action, but to leave enforcement to the Department of Transportation.

Since Petitioner's motion to amend his Complaint was untimely, unduly prejudicial, and futile, the Motion was properly denied. The issue raises no significant federal question that must be resolved by this Court. Therefore, Respondent requests that this Court deny certiorari on this issue as well.

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3. The *Stueart* case is completely irrelevant to the present action. *Stueart v. Arkansas Police Commission*, 329 Ark. 46 (Ark. 1997). While the Arkansas Supreme Court acknowledged that drug testing has serious Fourth Amendment implications, the case was a wrongful termination case. *Id.* The plaintiff was reinstated since his employer did not follow its own procedure in handling his drug test and subsequently terminating him. *Id.* at 53.

CONCLUSION

For all of the foregoing reasons, Respondent Drug Free, Inc. respectfully requests that this Court deny the Petition for Certiorari.

Respectfully submitted,

ERNEST L. WILKERSON, JR.
KATHRYN M. MILEY*
WILKERSON AND ASSOCIATES CO., LPA
Attorneys for Respondent
Drug Free, Inc.
1422 Euclid Ave., Suite 248
Cleveland, Ohio 44115
(216) 696-0808

* *Counsel of Record*